Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

AMERICAN WATER DEVELOPMENT, INC.,
a Colorado corporation,

Petitioner,

v.

CITY OF ALAMOSA, et al.,

Respondents.

Petition For Writ Of Certiorari
To The Colorado Supreme Court

APPENDIX TO PETITION FOR WRIT OF CERTIORARI
VOLUME II
(Pages A-270 through A-380)

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DISTRICT COURT, WATER DIVISION 3, COLORADO

Case No. 86CW46

AFFIDAVIT OF MICHAEL C. MEYER

CONCERNING THE APPLICATION FOR WATER RIGHTS OF AMERICAN WATER DEVELOPMENT, INC., THE BACA RANCH COMPANY, AND THE BACA CORPORATION

IN SAGUACHE COUNTY

STATE OF ARIZONA)
) ss.
COUNTY OF)

Michael C. Meyer, Affiant herein, being first duly sworn and under oath, deposes and states:

1. I am a Professor of History at the University of Arizona with the education, training, and experience set forth in the attached Curriculum Vita.

2. I researched and prepared a report entitled "The Hispanization of Southern Colorado," a copy of which is attached hereto and incorporated herein by this reference.

3. I have personal knowledge of the information contained in that report, and the facts and data contained therein are of a type reasonably and regularly relied upon by expert historians in forming opinions or inferences on the subject.

4. If called to testify concerning local law and custom in the San Luis Valley, my testimony would be substantially the same as that contained in the report.

5. Further, Affiant deposes and states that he has read the statements made herein, knows the contents thereof, and that the same are true to the best of his knowledge, information, and belief.

/s/ Michael C. Meyer
Michael C. Meyer

STATE OF ARIZONA)
) ss.
COUNTY OF PIMA)

SUBSCRIBED AND SWORN to before me this 14th day of May, 1990, by Michael C. Meyer.

/s/ Illegible
Notary Public

Address: /s/ Tucson,
Pima County
Arizona

My commission expires:

July 4, 1991

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THE HISPANIZATION OF SOUTHERN COLORADO

Michael C. Meyer

The centennial history of the state of Colorado, written by Professors Carl Abbott, Stephen J. Leonard, and David McComb, and published by the Colorado Associated University Press, aptly captures the cultural essence of the southern portion of the state when it labels that

region, "Hispanic Colorado."[1] Although the historiography of southern Colorado is yet to be completed, there is ample justification for such a designation.

After the conquest of central Mexico by Hernán Cortés in the early sixteenth century the Spanish crown initiated a carefully orchestrated policy of extending the boundaries of that new American colony to the north. It was a movement every bit as dramatic and every bit as significant as the later westward expansion of the United States. In the centuries following the defeat of the Aztec empire, Southern Colorado proved to be the northern limit Spanish expansion in the New World. It first became the far northern frontier of the Viceroyalty of New Spain and was governed by decrees issued by the Spanish crown, laws passed by the Royal Council of the Indies and local legislation enacted by Provincial governors and local town councils;[2] after Mexican independence from Spain in 1821 it became the northern boundary of the Mexican Republic and was subject to general laws of the Mexican Republic and to a series of Mexican constitutions promulgated in 1824, 1836, and 1843;[3] at the conclusion of

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[1] Carl Abbott, Stephen J. Leonard and David McComb, *Colorado: A History of the Centennial State* Rev. ed. (Boulder: Colorado Associated University Press, 1982), p. 42.

[2] A major codification of the Spanish laws governing the Possessions in the New world was published in four volumes in 1680. A facsimile edition of this monumental endeavor is now available. *Recopilación de leyes de los reynos de las Indias* (4 vols., Madrid: Cultura Hispanica, 1973).

[3] Mexico's constitutional evolution can be traced in Felipe Tena Ramírez (ed.), *Leves Fundamentales de México, 1808-1957* (Mexico City: Editorial Porrua, S.A., 1957).

the war between the United States and Mexico in the middle of the nineteenth century it fell within the territorial confines of Hispanic New Mexico and was covered by the Organic Act and subsequent laws of that new territory; and it was subsequently moved to the Colorado territory when that entity was formed in 1861 and was governed by the provisions of that Organic Act as well as the laws and statutes enacted by the Colorado Territorial Assembly.

Early Spanish Expeditions into Colorado

There is no conclusive evidence that the sixteenth century Spanish explorers ever set foot in what is today the state of Colorado. Francisco Vásquez de Coronado, Antonio Rodríguez, Antonio de Espejo and Juan de Oñate, all major contributors to the foundation of Spanish New Mexico, moved close but probably never walked on Colorado soil. Their successors most assuredly did and, in the process, set in motion the long process of the Hispanization of this region.[4]

The Spanish Penetration of southern Colorado was part of a system of pushing back the northern frontier by the process of defensive expansion, a mechanism tried and tested earlier in other parts of the Viceroyalty of New Spain. Initially there were far too few Spanish colonists to establish outposts everywhere in the north but periodic

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[4] The best general description of the early Spanish entries into Colorado remains Alfred B. Thomas, "Spanish Expeditions Into Colorado," *The Colorado Magazine* 1 (November, 1924), pp. 289-300. This article was based on the primary documentation found in Herbert Eugene Bolton's private collection.

military expeditions could reconnoitre, take formal possession in the name of the Spanish crown, and exert a sufficient presence to secure the territory in question from hostile Indians or foreign interlopers.

The first recorded European *entrada* into Colorado occurred in the middle of the seventeenth century, probably 1664, when some twenty Spanish soldiers, and a small force of Pueblo Indian allies, under the command of Juan de Archuleta were sent north from the presidio at Santa Fe to capture some runaway Taos Indians. They moved into southeastern Colorado and found and recaptured their runaways at camp called El Cuartelejo northeast of present day Las Animas. Although this first expedition was little more than a footnote in Colorado history the Spaniards had expanded their geographic horizons and had recognized the desirability of securing the region at some time in the future.

In 1680 the Pueblo Indians of New Mexico's Rio Grande Valley rose up in a massive rebellion and drove the Spaniards completely out of the New Mexican province. It took the Spaniards twelve years to recapture the territory and when the conquest was ultimately effected by Diego de Vargas in 1692 it was amply clear that the southern Colorado frontier had to be more tightly secured. Not only did the region house runaway Pueblo Indians but other Indians, Apaches, Comanches, Utes and Pawnees conducted raids on northern New Mexican outposts and then utilized southern Colorado as a safe refuge. Moreover, by the end of the seventeenth century French and English explorers had begun to threaten the

integrity of northern New Spain.[5] The Spanish response came at the beginning of the eighteenth century.

In 1706, on the orders of New Mexico governor Francisco Cuervo de Valdez, Juan de Ulibarrí led forty Spanish soldiers and a hundred Pueblo Indian auxiliaries northeastward from Taos again to capture runaway New Mexico Indians from Picuris Pueblo.[6] He found his runaways once again at Cuartelejo but, more importantly, he was informed that Spain's French rivals were arming Pawnee Indians for attacks on Spanish outposts. The Ulibarri expedition was far more important than Juan de Archuleta a half a century earlier. On August 2, 1706, seventy years before the United States Declaration of Independence, this Spanish commander took formal possession of southern Colorado in the name of the Spanish King. In his act of possession he used essentially the same words that other Spanish commanders had used in hundreds of other sites from the southern tip of South America to the northern reaches of New Spain: "Knights, Companions, and Friends: Let the Broad new province of San Luis, the great settlement of Santo Domingo of El Cuartelejo be pacified by the arms of us who are vassals of our monarch, king and natural lord, Don Philip V, may

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[5] The international rivalry can be traced in James H. Baker and LeRoy R. Hafen, *History of Colorado* (3 vols. Denver: Linderman Co., Inc., 1927), I, 263-273. This three-volume history was prepared under the supervision of the State Historical and Natural History Society of Colorado. See also Junius Henderson, et al., *Colorado: Short Studies of its Past and Present* (Boulder: University of Colorado Press, 1927), pp. 45-52.

[6] The name of the leader of this expedition is sometimes rendered as Uribarri.

he live forever."[7] From the legal point of view southern Colorado was now a Spanish territory just as Argentina, Peru, Guatemala, or Mexico.

Securing southern Colorado was deemed of sufficient importance that a new Governor of New Mexico, Don Antonio Valverde Cosío, led an expedition of 700 men into the region in 1719 and subsequently sent Pedro de Villasur on a follow-up expedition the next year. Other Spanish entradas followed on their heels. By the middle of the eighteenth century Indians and foreigners alike were not surprised to encounter Spanish troops south of the Arkansas River. With northern New Mexico outposts as their base of operations, Spanish armies and explorers crisscrossed the region, mapped it, named its topographical features and opened the trails that others would later use.[8]

Defensive expansion worked in southern Colorado. The Comanche proved more intractable than other Indian tribes or Spain's European rivals but they were ultimately defeated by Spain's famous Indian fighter Captain Juan Bautista de Anza who moved through the San Luis Valley with 600 mounted soldiers in 1779, killed Comanche Chief Cuerno Verde, and routed his forces in the hill country between present day Pueblo and Walsenberg. Following this encounter some thirty Spanish settlers built the first adobe village in southern Colorado, not for

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[7] Quoted in Alfred B. Thomas, *After Coronado* (Norman: University of Oklahoma Press, 1935), p. 69.

[8] Among the better early maps of southern Colorado were those drawn by cartographers Bernardo de Miera y Pacheco in 1778 and Juan López in 1795.

themselves but for the Comanches who they hoped would settle down. Located on the Arkansas River (the Rio Napeste in the contemporary documentation) the Spaniards named it San Carlos.[9] The Comanches didn't remain there for long but the force of Spanish arms had persuaded them to keep the peace for another sixty years. Foreigners too learned about Spanish control. When American Zebulon Pike moved into southern Colorado in 1806, established a fort on the Conejos River the following year, and raised the American flag, he was arrested by Spanish troops and taken first to Santa Fe and later to Chihuahua City for incarceration. The Spanish authorities wanted to hear nothing of Pike's Peak. They had already discovered the impressive cone and had named it El Capitán.

The Boundary of Hispanic Colorado

The northern boundary of New Spain had always been vague. Some of the eighteenth century Spanish expeditions had moved north of the Arkansas River but Spain had made no real effort to claim the territory further to the north. The exact boundary line seemed especially insignificant after Spain acquired Louisiana from France in 1763. Spain's French rival had in that arrangement forfeited all claims to the territory west of the Mississippi. But when France reacquired the Louisiana territory in 1800, and agreed to sell it to the United States three years later, the boundary between United States and Spanish territory became important indeed.

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[9] Abbott, Leonard and McComb, *Colorado*, p. 30.

The Louisiana Purchase Treaty, however, proved to be vague on the matter or boundaries. As the expedition of Zebulon Pike into Spanish territory had demonstrated, the United States was unsure of what it had purchased.

The boundary issue in Colorado was resolved a few years later when the United States purchased Florida from Spain. The framers of the Adams-Onís Treaty, signed in 1819 and ratified in 1821, took the occasion to correct the vague passages in the Louisiana Purchase. They formalized what had already become accepted by Spain and its international rivals on the North American continent. Spanish territory in Colorado terminated at the Arkansas River. Article III of the Adams-Onis Treaty carefully plotted a line moving north and west from the Gulf of Mexico to the Red River and " . . . running thence by a Line due North to the River Arkansas, thence following the Course of the Southern bank of the Arkansas to its source in the Latitude 42. North, and thence by that parallel of Latitude to the South-Sea [Pacific Ocean]."[10] To reinforce the works of the treaty-makers, Spanish soldiers erected a fort on the headquarters of the Huerfano River the same year the document was signed. Colorado south of the Arkansas, that portion of the state not included in the Louisiana Purchase, was clearly Hispanic Colorado.

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[10] The text of the Adams-Onis Treaty has been published many times. A convenient reproduction of this and other pertinent articles in found in Armin Rappaport, *Sources in American Diplomacy* (New York: The Macmillan Company, 1966), pp. 32-33.

The Mexican Land Grants

With international recognition of Spain's title to southern Colorado the Period of defensive expansion ended. Colonization and settlement would follow. Initial plans were disrupted by the chaotic period of Mexico's independence from Spain and by the formidable challenges Mexico faced in building a new nation state. But by the 1830s and 1840s the threat of United States westward expansion combined with population pressures and demands for new irrigable lands in northern New Mexico to open a new Phase in the history of southern Colorado.

There is some indication that the actual settlement of southern Colorado might have begun during the late colonial period. Colorado's first territorial governor, William Gilpin, for example, met Amidor Sánchez in 1864 on the Sangre de Cristo Grant. Sánchez was reportedly 101 years old at the time of this encounter and informed Gilpin that he had been born in the house in which he was still living.[11] When Captain Zebulon Pike explored Colorado in 1807 he reported finding a road (not a trail) in the San Luis Valley, another indirect indication of settlement in the years immediately prior to Mexican independence.[12] The evidence is far from conclusive but any settlement that occurred during the period of Spanish rule was at best sporadic and widely scattered. This pattern would change in the decades ahead.

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[11] Forbes Parkhill, "Colorado's Earliest Settlements," *Colorado Magazine* 34 (October, 1957), p. 241.

[12] Parkhill, "Colorado's Earliest Settlements," p. 242.

The second quarter of the nineteenth century witnessed the consolidation of Hispanic control of southern Colorado through the mechanism of the land grant. The first known request for a formal land grant in Colorado was made in late 1828 or early 1829 by Miguel Garcia, Julian Gorden and Jose Manuel Copas. They asked for a land grant on the Rio de la Culebra in the San Luis Valley. Because Gorden and Copas were not Mexicans, but United States citizens living in the Taos region, New Mexico Governor Francisco Serracino denied the request on June 6, 1829.[13] Other petitioners would encounter much greater success.

In the 1830s and 1840s six large land grants were made by New Mexico governors in what would later become Archuleta, Conejos, Alamosa, Costilla, Rio Grande, Saquache, Las Animas, Huerfano, Pueblo, Bent and Otero Counties. Four of these grants, the Tierra Amarilla Grant (650,000 acres), the Conejos Grant (2,000,000 acres); the Sangre de Cristo Grant (1,038,195 acres), and the Beaubien and Miranda Grant, later referred to as the Maxwell Grant (1,714,764 acres) straddled the present-day Colorado-New Mexico border. The remaining two grants, the Vigil and St. Vrain Grant (4,000,000) and the Gervacio Nolan Grant (575,968 acres) were entirely in Colorado.[14]

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[13] The document containing the request has been lost but the governor's rejection is contained in Serracino, Cabesa de Vaca and Baca y Terres to Exmo Sor, June 6, 1829, Spanish Archives of New Mexico, I, Reel 3, Frame 6.

[14] An outline map of these grants is contained in an excellent article written by former Colorado Governor Ralph Carr. See his "Private Land Claims in Colorado," *Colorado Magazine* 25 (January, 1948), pp. 10-30.

Some of the grantees obtained their land for growing crops and grazing sheep and cattle. The early settlement of the land grants was fraught with difficulties. The Gervacio Nolan Grant was occupied and cultivated by settlers brought in by the grantee but activities were interrupted almost annually by Indian hostilities. The Vigil and St. Vrain grantees experienced similar difficulties but were able to construct a number of houses on the Purgatoire River and graze between 1,500 and 1,600 head of cattle on the grant before the Mexican War.[15] The Sangre de Cristo Grant attracted on a few settlers, most of whom grazed sheep.

The Conejos community grant was a more ambitious undertaking. Its clear purpose was colonization. The grant was made originally in 1833 by Governor Francisco Serracino to forty northern New Mexico families. They attempted settlement the following year but were ultimately forced to return to New Mexico because of an entire series of Indian depredations. In 1842 the grant was renewed, this time to eighty-four Mexican heads of families, led by Seledón Valdez, Julián Gallegos, Antonio Martínez, and José María Martínez. Each head of family was given an individual plot of land, fronting on the San Antonio River, near its confluence with the Conejos.[16] Settlement of the grant began the following year as land

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[15] William W. Morrow, *Spanish and Mexican Private Land Grants* (San Francisco: Bancroft-Whitney Company, 1923), p. 130.

[16] A useful study of this grant is Purnee A. McCourt, "The Conejos Grant of Southern Colorado," *Colorado Magazine* 52 (Winter, 1975, especially pages 37-40).

was plowed, *acequias* (irrigation ditches) dug and crops planted. The colonists enjoyed a precarious existence in the decade which followed as Indians, Utes and Navajos, periodically drove them off the lands they were trying to settle,[17] but they kept coming back. At the same time that these Mexican families were trying to carve out new lives for themselves, Medano Springs, at the western foot of Mosca Pass, was occupied and continued to be occupied throughout the 1830s.[18]

Other Mexicans moved north at about the same time to live in isolated *ranchos* from where they farmed, trapped, grazed sheep and hunted.[19] When they came together in tiny rural communities these incipient villages were termed *plazas* or *placitas*. The presence of ranchos and placitas is revealed in some of the contemporary travel literature[20] but once again the precise activities of these early Mexican residents have largely escaped the historical record. What is not in doubt is that

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[17] The fortunes and misfortunes of the first Mexican settlers in Colorado are traced in LeRoy R. Hafen, "Mexican Land Grants in Colorado," *The Colorado Magazine* 4 (May, 1927), pp. 82-93.

[18] Parkhill, "Colorado's Earliest Settlements," pp. 242-249.

[19] Marc Simmons defines rancho as "one or more Spanish households located adjacent to farm and orchard lands." They were a characteristic feature of the New Mexico landscape by the eighteenth century. See Simmons, "Settlement Patterns and Village Plans in Colonial New Mexico," *Journal of the West* 8 (January, 1969), p. 13.

[20] As an example Lewis H. Garrard describes a Colorado rancho north of Raton Pass in 1847 in his *Wah-To-Yah and the Taos Trail* (Norman: University of Oklahoma Press, 1955), pp. 144-146.

the Hispanization of southern Colorado, including the beginning of settlement and colonization had fully two hundred years of history when the Mexican War resulted in a change of territorial sovereignty in 1848. This Hispanization intensified during the next fifteen years.

Southern Colorado in the New Mexico Territory

When New Mexico became part of the United States following ratification of the Treaty of Guadalupe Hidalgo the northern boundary of the New Mexico Territory remained exactly as it had been delineated in the Adams-Onis Treaty of 1819. And when the territory was broken into counties in January of 1852, southern Colorado became part of Taos County.[21]

As the laws of the New Mexico territory were defined by the Legislative Assembly local Hispanic law and custom were woven into the new legal fabric and, on occasion dominated it. Water law affords an excellent example. In July of 1851 and January of 1852 the New Mexico Territory enacted water legislation to regulate irrigation ditches (*acequias*). The new laws made clear distinctions between private ditches and common ditches and between main ditches and collateral ditches. They provided for ditch super visors to be elected by local inhabitants and specified the duties of these supervisors. All persons using a common ditch were required by law

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[21] See Section 4 of the Act of 6th January, 1852, *Revised Statues and Laws of the Territory of New Mexico in Force at the Close of the Session of the Legislative Assembly Ending February 2, 1865* (St. Louis: E. P. Studley and Company Printers, 1865).

to provide labor for its annual cleaning and repair in proportion to the amount of their land watered by the ditch. Penalties for illegal diversions and other infractions were specified as well.[22] The entire water system articulated in the Territorial legislation is almost indistinguishable from that already in place under Spain and Mexico, the new Territory's antecedent sovereigns.[23] The system was neither riparian nor based on the doctrine of appropriation. It combined features of both with other elements of Spanish jurisprudence. The resulting corpus of law applied to all of the New Mexico Territory, including Colorado south of the Arkansas River.

In the decade of the 1850s thousands of New Mexican Hispanics moved north with the purpose of reclaiming lands that had been lost earlier by their ancestors to the Indians. They were looking for irrigable lands and suitable pasture for their cattle, goats and sheep. The Permanent Hispanic settlement of San Luis on the Culebra Creek, founded by migrants from the New Mexico towns of Taos and Mora, dates from 1851. It was followed in 1852 by the foundation of San Pablo. San Acacio was

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[22] Act of 20th July, 1851 and Act of 7th January, 1852, *Revised Statutes and Laws of the Territory of New Mexico.*

[23] Spanish and Mexican water law, including those matters treated here, is developed in Michael C. Meyer, *Water in the Hispanic Southwest: A Social and Legal History, 1550-1850* (Tucson: University of Arizona Press, 1984). See also Marc Simmons, "Spanish Irrigation Practices in New Mexico," *New Mexico Historical Review* 47 (April, 1972), 135-150 and Alvin Sunseri, "Agricultural Techniques in New Mexico at the Time of the Anglo-American Conquest," *Agricultural History* 47 (October, 1973), 329-337.

founded in 1853 and within that same decade the Mexican Villages of San Pedro, Guadalupe, Los Fuentes, Chama and Conejos came into existence. Costilla and Trinidad followed shortly thereafter. A tiny Mexican rancho called La Plaza de los Leones, settled by a stock raising family, the Atensios in 1858 (perhaps 1861), later became Walsenberg.[24] By 1860 more than 2,000 Mexican farmers were working forty *acequias* mostly in the river basins encompassed by the land grants made by the governors of New Mexico two decades earlier.[25] There were thirty-seven plazas in southern Colorado.[26] These native New Mexicans, of course, had not migrated into a new territory as no Political line yet divided New Mexico from southern Colorado. They had simply moved north in search of a better life for themselves and their families.

Hispanics in the Colorado Territory

In February of 1861 the United States Congress created a separate territory for Colorado. The enabling legislation removed that portion south of the Arkansas from the jurisdiction of the New Mexico Territory and placed it

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[24] Richard L. Nostrand, "A Century of Hispanic Expansion," *New Mexico Historical Review* 62 (October, 1987), pp. 361-386.

[25] See Abbott, Leonard and McComb, *Colorado*, p. 141. The estimate is probably low as in the year 1860 there were some 1,500 Mexicans living on the Conejos Grant alone. See Judith Gamble, "Colorado's Hispanic Heritage," *Colorado Heritage* 3 (1988), p. 4.

[26] Hugh and Evelyn Burnett, "Madrid Plaza," *Colorado Magazine* 62 (Summer, 1965), p. 224.

within the the boundaries of the new Colorado territory.[27] The Mexican presence in the southern portion of the territory was clearly recognized as Section V of the Territorial Act defined citizenship. Included as citizens, with the full right to vote and hold public office were "those recognized as citizens by the Treaty with the Republic of Mexico, concluded February two, eighteen hundred and forty-eight [the Treaty of Guadalupe-Hidalgo] and the treaty negotiated with the same country on the thirteenth day of December, eighteen hundred and fifty-three [the Gadsden Purchase Treaty] . . . "[28]

The property rights of Mexicans were already protected by the Treaty of Guadalupe-Hidalgo but further protection was afforded by the territorial act which, in Section 6 stated that "no law shall be passed impairing the rights of private property."[29] If Mexican Property rights exceeded those of citizens north of the Arkansas, or elsewhere in the United States, the Territorial Act provided relief here as well. Section 16 allowed that " . . . the Constitution and all laws of the United States *which are not locally inapplicable* [emphasis mine] shall have the same force and effect within the said Territory of Colorado as elsewhere within the United States."[30]

Hispanics from that portion of the territory south of the Arkansas River sat in the Colorado Assembly from

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[27] An Act to Provide a Temporary Government for the Territory of Colorado, February 28, 1861, Thirty-Sixth Congress, Second Session.

[28] Ibid., Section V.

[29] Ibid., Section 6.

[30] Ibid., Section 16.

the very beginning. The first two Hispanic assemblymen, Victor García and Jesús Barela, represented Pueblo and the San Luis Valley. Neither of them spoke English but the Territorial government provided translators for them.[31] In their representation of their respective districts they, and their Hispanic successors, assumed a special responsibility. They sought to assure that the Territorial Assembly would recognize the distinct laws and customs of Hispanic Colorado. As will be shown below they were successful in this effort.

Hispanic Culture in Southern Colorado

The towns of San Luis, Acacio, Guadalupe, Conejos, Trinidad and Costilla were more than 2,000 miles north of Mexico City. But those early Mexican families who settled southern Colorado in the 1830s, 1840s and 1850s were able to maintain their Hispanic culture. Some of it was preserved intact and some of it underwent the inevitable mutations and improvisations always found in peripheral areas isolated from the metropolitan core.

The language of southern Colorado in the middle of the nineteenth century was Spanish and the religion of its settlers, a Roman Catholicism strongly influenced by the liturgy, rites and pageants of the Penitential Brothers (Los Hermanos de los Penitentes).[32] The first church structure

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[31] Howard Roberts Lamar, *The Far Southwest 1846-1912: A Territorial History* (New York: W. W. Norton, 1970), p. 236.

[32] The most thorough study of the penitentes is Marta Weigle, *Brothers of Light, Brothers of Blood: The Penitentes of the Southwest* (Albuquerque: University of New Mexico Press,

within the future boundaries of the state of Colorado went up in Conejos in 1858[33] and, in the best Mexican tradition, it was called Nuestra Señora de Guadalupe in honor of the patroness saint who appeared in Mexico City three centuries earlier. The southern Colorado region was made subject to the Diocese of Santa Fe.

Many of the first towns in Hispanic Colorado were laid out in the Spanish tradition. They were built around a central Plaza and when deemed necessary for defensive purpose the plaza was enclosed by a strong wall.[34] The prime building material, adopted from the Pueblo Indians of New Mexico, and modified in the Rio Grande Valley, was adobe. The architectural forms were almost a carbon copy of those found to the south along the Rio Grande between Taos and El Paso. Ceilings were supported by heavy vigas, the ends of which Penetrated the outer front walls. Private houses, generally of two or three rooms, seldom had windows or doors in the rear. This architectural anomaly, combined with the thick adobe walls, gave the individual house a fortress-like structure, obviously of great benefit in the case of Indian attack. Unlike a wooden structure, a house built of adobe bricks could not easily be penetrated or set on fire.

1976). A short but useful article on the same subject is E. R. Vollman, S. J., "Religious Processions and Penitente Activities at Conejos, 1874," *Colorado Magazine* 31 (July, 1954), pp. 172-179.

[33] Carl Ubbelohde, *A Colorado History* (Boulder: Pruett Press, Inc., 1965), pp. 56-57.

[34] The town of Costilla, for example, had an enclosed plaza. See Abbott, Leonard and McComb, *Colorado*, p. 43.

Food preparation (chile, frijoles tortillas and atole) was identical to that of parents or grandparents from Albuquerque or Chihuahua City. As in New Mexico kinship patterns and the practice of *compadrazco* (godparenthood) resulted in closely knit families and strong social relationships. Similarly the folk art, folk medicine and folk literature of those early Colorado Hispanics, especially the religious ballads known as *alabados*, were part of the cultural baggage carried with them as they moved north from Santa Fe and Taos.[35] They celebrated the same feast day, used the same herbal medicines, told the same stories to the children, performed the same religious plays and danced to the same music as their New Mexico relatives to the south.[36]

The early Mexican settlers lived in tiny rural communities and dedicated themselves primarily to subsistence agriculture. Some brought a few cattle, goats and sheep with them and began grazing them in the San Luis Valley and also north of Raton Pass in the area surrounding Trinidad. They also brought the experience they had

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[35] The *alabados* of northern New Mexico and southern Colorado are examined in J. Manuel Espinosa, "Additional Hispanic Versions of the Spanish Religious Ballad 'Por el Rastro de la Sangre'," *New Mexico Historical Review* 565 (October, 1981), pp. 349-367 and Thomas J. Steele, S.J., "The Spanish Passion Play in New Mexico and Colorado," *New Mexico Historical Review* 53 (July, 1978), pp. 239259 and Thomas J. Steele, S.J., "The Death Cart: Its Place among the Santos of New Mexico," *Colorado Magazine* 55 (Winter, 1978), pp. 1-14.

[36] The cultural life of Colorado's early Hispanic population is skillfully traced in Arthur L. Campa, *Hispanic Culture in the Southwest* (Norman: University of Oklahoma Press, 1979), pp. 147-152.

gained in New Mexico in apportioning land and water. Land was partitioned in long-lot fields. These long but narrow strips of land gave each settler at least 100 or 150 yards of stream or ditch frontage from which individual irrigation systems could be built. The same pattern had long been used in New Mexico's upper Rio Grande Valley.[37] On these strips the Colorado Mexicans began growing corn, chile, beans, peas, wheat, onions, beets and cabbages. When water became scarce because of a less than sufficient spring runoff they entrusted the delicate task of water allocation to a ditch supervisor (the *mayordomo*), elected by the irrigators themselves.

Even the budding American trading posts located in the Arkansas Valley exhibited the strong influences of Mexican culture. Bent's Fort, on the north bank of the Arkansas was an adobe structure built by Mexican masons. Most of the residents, as well as the trappers and traders that visited, had Mexican wives from Taos. Janet Lacompte captured the phenomenon in the 1840s well:

> Taos had importance to the Arkansas Valley settlements all out of proportion to its size. From Taos came indispensable items such as whisky, flour, and news. To Taos the Arkansas Valley settlers went for visits, marriages, and baptisms. Because of their close ties with Taos, the Arkansas Valley settlements had a flavor far more Mexican than American, with a culture of

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[37] Alvar W. Carlson, "Long Lots in the Rio Arriba," *Annals of the Association of American Geographers* 65 (March, 1975), pp. 48-57 and Alvar W. Carlson, "Rural Settlement Patterns in the San Luis Valley: A Comparative Study," *Colorado Magazine* 44 (Spring, 1967), pp. 117-118.

saint's days, fandangos, Spanish language, Mexican music and food.[38]

Among the permanent imprints left for future generations to ponder were Spanish names they gave to towns, counties, rivers and mountains: Abeyta, Aguilar, Boncarbo, Cuarto, Delagua, Delcarbon, El Moro, Garcia, Primero, Quinto, Segundo, Trinchera, and Vallaroso (in Las Animas County); Alamosa, Estrella, and Mosca (in Alamosa County); Antonito, Capulin, Conejos, Cumbres Pass, La Jara, Lasauseo, Lobatos, Los Cerritos, Mogote, Paisaje, Platoro, and Romeo (in Conejos County); Blanca, Chama, Jaroso, San Acacio, and San Luis (in Costilla County); Bonanza, La Garita, and Sangre de Cristo (in Saguache County); Cuchara, Farisita, Huerfano River, and La Veta (in Huerfano County); Durango, Florida, Posta, and Vallecito (in La Plata County); Pagosa Springs and Piedra (in Archuleta County).[39] Even the name of the Territory, and subsequently the state, derives from the river named Colorado by the Spaniards in the sixteenth century.

Hispanic law and customs were clearly recognized by the Territorial Assembly. Most important to those who resided between the New Mexico border and the Arkansas River, all laws passed by the Assembly were

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[38] Janet Lecompte, *Pueblo, Hardscrabble, Greenhorn: The Upper Arkansas, 1832-1856* (Norman: University of Oklahoma Press, 1978), p. 67.

[39] A more comprehensive list is contained in J. Frank Dawson, *Place Names in Colorado* (Denver: The J. Frank Dawson Publishing Company, 1954).

translated into Spanish for distribution in the south.[40] And some of the laws themselves took cognizance of the distinctive Hispanic heritage of that region. Territorial water law offers itself as one significant example.

On February 6, 1866 the Territorial Assembly passed "An Act to Regulate Ditches Used for Farming Purposes in the Counties of Costilla[41] and Conejos."[42] In order to recognize and perpetuate Hispanic law and custom the act used the Spanish words *acequia* (ditch) and *acequia madre* (main ditch) throughout. Moreover the substance of the law was in complete harmony with Hispanic water law and practice in the southwest prior to the change of territorial sovereignty at the conclusion of the war between the United States and Mexico.

The Act provided for the election of ditch supervisors a practice which has deep roots in Hispanic Water law. In thirteenth century Valencia, Spain *cequiarius* (ditch supervisors) were communally elected as in Section 1 of the Colorado Act and had the responsiblity of overseeing the cleaning and repair of ditches as in Section 4 of the same

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[40] Lamar, *The Far Southwest*, 237.

[41] Saguache County was subsequently carved out of Costilla County.

[42] An Act to Regulate Ditches Used for Farming Purposes in the Counties of Costilla and Conejos, February 5, 1866 in *General Laws, Joint Resolutions, Memorials and Private Acts Passed at the Fifth Session of the Legislative Assembly of the Territory of Colorado*, pp 61-64.

Act.[43] In the Hispanic Southwest these same practices continued. The *cequiarius*, most often called *mayordomos* or *mandadores* in the Southwest, were responsible for the maintenance of the ditches, as in Section 4 of the Colorado Act, and for the distribution of water, as in Section 5 of the Act.[44] Throughout northern Mexico and the Southwest all persons who used an *acequia* were required to contribute to its maintenance and repair. Those who did not contribute with their own labor had to pay for the work, just as in Section 4 of the Act.[45] During the growing season water for irrigation purposes took precedence over water for other purposes, as in Section 12.[46] Misdemeanors, brought about by misuse of the *acequia*, or the waters contained therein, were subject to fines, as in Section 6 of the Act.[47] Clear distinctions were made between private and public or community *acequias*, as in Section 12 of the Act.[48]

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[43] See Robert Ignatius Burns, "Irrigation Taxes in Early Mudejar Valencia: The Problem of the Alfarda," *Speculum* 44 (October, 1969), p. 563.

[44] See, for example, Alvin Sunseri, "Agricultural Techniques in New Mexico at the Time of the Anglo-American Conquest," *Agricultural History*, 47 (October, 1973), p. 330.

[45] See, for example, Plan de Pitic, Article 21, Mexico, Archivo General de la Nación, Tierras, Vol. 2773, Expediente 22.

[46] See Plan de Pitic, Article 19, Ibid.

[47] Edward P. Arneson, "Early Irrigation in Texas," *Southwestern Historical Quarterly*, 25 (October, 1921), p. 128.

[48] Wells A. Hutchins, "The Community Acequia: Its Origin and Development," *Southwestern Historical Quarterly* 31 (January, 1928), pp. 261-284.

The Territorial Assembly had no second thoughts about the appropriateness of the Act. The 1870 Census reported that over one fifth of the Territory's population was Hispanic.[49] On January 22, 1872 the same act written for Conejos and Costilla counties was extended to Huerfano County[50] and three weeks later it was made applicable in Las Animas County as well.[51]

The Hispanic delegates to the Territorial Assembly were also aware of the traditional procedures to be followed when a new ditch was to be opened. Its general boundaries were recorded in the public record, any special Provisions were noted, and the owner of the ditch

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[49] The Census of 1870 recorded Colorado's population at 39,864. Of this number 8,333 indicated that they had been born in New Mexico. Las Animas had 3,339 born in New Mexico; Conejos, 1,473; Huerfano 1,442; Costilla, 1,137; Pueblo, 569; Saguache 130; and Bent, 96. It is certain that almost all of these persons who listed New Mexico as their place of birth were Hispanics. In addition there were many additional Hispanics in southern Colorado, some born in other Mexican provinces and many children born to Hispanic parents in Colorado itself. An interesting study of the politics of these early Colorado Hispanics is found in William B. Faherty, "Regional Minorities and the Woman Suffrage Struggle," *Colorado Magazine* 33 (July, 1956), especially p. 217.

[50] An Act to Extend and Make Applicable to the County of Huerfano, an Act Entitled "An Act to Regulate Ditches Used for Farming Purposes in the Counties of Costilla and Conejos," January 22, 1872 in *General Laws, Private Acts, Joint Resolutions, and Memorials Passed at the Ninth Session of the Legislative Assembly of the Territory of Colorado*, p. 143.

[51] An Act to Extend and Make Applicable to the County of La Animas, an Act entitled "An Act to Regulate Ditches, used for Farming Purposes, in the Counties of Costilla, and Conejos," Ibid., p. 145.

was reminded of the general water practices in force.[52] On February 12, 1874, in keeping with these principles, the Colorado Territorial Assembly passed a new act concerning irrigation for Las Animas County:

> Be it enacted by the Council and House of Representatives of the Colorado Territory, That the "Acequia" which is about to be constructed by the inhabitants of the river of San Francisco, in the County of Las Animas, Territory of Colorado, and which takes its head at the south or west side of Manuel Ocana's farm, and runs thence in a easterly course until it reaches the farm of Seferino Derrera [Probably Herrera] be recognized by the name of (Acequia Madre) or Main Ditch.
>
> 2. That the Superintendent of this Acequia be elected according to section one (1) of the Revised Statutes of Colorado, page 365 that he be empowered to call out all persons using water from the Acequia, respectively to repair

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[52] Ditch legislation and adjudication of ditch disputes in the Hispanic southwest can be traced in the following documents: Ayuntamiento de Abiquiu to Jefe Politico Santiago Abreu, July 4, 1832, Mexican Archives of New Mexico, Reel 15; Manuel Martinez to Jefe Politico, July 3, 1832, Mexican Archives of New Mexico, Reel 15; Autos de la Visita General de este Reino de la Nueva Mexico fechos por el Señor Sarxto Maior Dn Joaquin Codallos y Rabal, Govr y Capn Gral de dho Reino . . . Aug 16 to Oct 20, 1745, Spanish Archives of New Mexico, II, 470; Los Dueños de la Labor de Abajo to Governor Martinez, Feb. 22, 1822, Bexar Archives, Reel 70; Testimonio, Bernalillo, Nuevo Mexico, July 18, 1829, University of New Mexico, Seligman Collection; Santa Ana – Angostura, and Ysabel Jorge, Phelipe Gallegos, and Antonio de Gurule vs. Xristopal Garcia, Jan. 7 to Feb. 9, 1733, Spanish Archives of New Mexico, I, 379.

> the Acequia, or Dam and he who shall fail to supply his share of work on the Acequia, or Dam, shall be liable to a fine imposed by the Superintendent in a sum not less than two (2) nor more than six (6) dollars for each and every day he is absent when required. And said sum shall be applied to the benefit of said Acequia.[53]

It is significant that none of the above mentioned Acts were extended to Larimer, Weld, Boulder, Jefferson, or other counties north of the Arkansas where the water traditions reflected a very different cultural inheritance. But in the passage of the Acts of 1866, 1872, and 1874 the Territorial Assembly of Colorado clearly acknowledged what the residents of southern Colorado already knew. It acknowledged what the heirs of Luis Maria Cabeza de Vaca knew when they selected the land for the fourth of their five floats. Colorado south of the Arkansas was a cultural continuum of New Mexico. Law and custom in this part of the Colorado territory were Hispanic law and custom.

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[53] An Act Concerning Irrigation, February 12, 1874 in *General Laws, Private Acts, Joint Resolutions, and Memorials Passed at the Tenth Session of the Legislative Assembly of the Territory of Colorado* (Central City, Register Printing House, 1874), pp. 167-168.

DISTRICT COURT, WATER DIVISION 3, COLORADO

Case No. 86CW46

MOTION, WITH RECITATION OF AUTHORITIES, FOR ORDER GRANTING APPLICANT DUE PROCESS IN FORM OF NOTICE, EVIDENTIARY HEARING, DISCOVERY, AND ESTABLISHING ISSUES AND PROCEDURE FOR SAME

CONCERNING THE APPLICATION FOR WATER RIGHTS OF AMERICAN WATER DEVELOPMENT, INC.,

IN ALAMOSA, CONEJOS, COSTILLA, HINSDALE, MINERAL, RIO GRANDE AND SAGUACHE COUNTIES.

Applicant American Water Development, Inc. (hereinafter "American Water" or "Applicant"), by and through the undersigned attorneys of Saunders, Snyder, Ross & Dickson, P.C., hereby respectfully moves this Court to enter an Order providing Applicant with its due process rights in the form of notice pleading, an evidentiary hearing, discovery regarding the Objectors' claims attributable to dismissal of the tributary claim and establishing the issues and procedure to be followed in order to provide American Water with due process. In support hereof, Applicant states and avers as follows:

1. On September 26, 1991, American Water moved to dismiss its claim for tributary water rights pursuant to C.R.C.P.41(a)(2) and other authority. Applicant's motion

was granted by the Court. The Applicant acknowledged the authority of the Court to conduct a subsequent hearing on the imposition of terms and conditions, including attorneys fees and costs. However, the Court proceeded, without the benefit of a formal motion for attorneys fees and costs or an evidentiary hearing, to order that Applicant pay Objectors' attorneys fees and costs reasonably and necessarily incurred in opposing the tributary claim. This decision has no foundation in fact, was reached without an evidentiary hearing and was made in violation of Applicant's substantive and procedural due process rights. The only matter the Court left to be determined at the subsequent hearing was the amount of fees and costs to be paid.

2. The Court erroneously relied solely upon Rule 41(a)(2) C.R.C.P. and ignored the Applicant's reliance upon Rule 11 and § 13-17-102(5) 6A C.R.S. (1987). The use of Rule 41(a)(2) was solely as a mechanism for the Applicant to perform its statutory obligation to withdraw a claim within a reasonable time after it became aware that it could not prevail on the claim. Under the statutory provision, attorneys fees may not be assessed if the dismissal was within a reasonable time. Section 13-17-102(5), 6A C.R.S. (1987). As shown in Applicant's Reply Brief on the Motion to Withdraw, Colorado law allows an Applicant to complete the formation of its intent to appropriate tributary water up to the close of evidence. Applicant's Reply Brief p. 13-20.

Objectors' entitlement to attorneys' fees is contrary to the American Rule that a party bear its own attorney fees and any exception must be based upon a substantive

right to recover such fees. Rule 41(a)(2) is not the substantive mechanism, rather Rule 11 and 13-17-101 *et seq.* 6A C.R.S. (1987) provide the exclusive basis for awarding fees in civil litigation in Colorado. The Court cannot award fees in absence of an underlying finding of bad faith or prosecution of frivolous or groundless claim. *W.L. Gore & Associates, Inc. v. Oak Materials Group, Inc.* 424 F.Supp. 700, 702 (D. Del. 1976). Nor can a court award fees solely on the basis of assertions and opinions by Objector's counsel, unsupported by facts in the record. Id. at 702. When there are disputed issues of fact, as the Court itself acknowledged with respect to reasonableness of the timing of the motion to dismiss (Transcript 10/10/91 p.77 15-19), an evidentiary hearing must be held to resolve them. *Matter of First Colonial Corp. of America*, 544 F.2d 1291, 1300 (5th Cir. 1977).

This Court's failure to hold a hearing on the reasonableness of the timing of filing the motion to withdraw denied Applicant its right to due process under the law. In addition, the subsequent amendment of Rule 11 and adoption of the statute supersede the provisions of Rule 41(a)(2). The Court's error can be corrected by providing for an evidentiary hearing to include these issues. Any award of attorneys fees and costs made in the absence of a factual determination following an evidentiary hearing would be fatally flawed.

3. The Objectors, by making a claim for attorneys fees and costs (which they have not formally done to date) are making a claim for injury to their property. In order to be able to have a fair and reasonable opportunity to respond to such a claim, Applicant is entitled to have a formal pleading from the Objectors setting forth the

nature, amount and grounds for each claim in order to afford the Applicant with a notice of claim upon which it can formulate a response and present any defenses available to it. To hold otherwise would constitute a clear denial of due process to the Applicant. See, *National Assoc. of Concerned Veterans v. Secretary of Defense,* 219 App. D.C. 94, 675 F.2d 1319, 1329 (1982)

4. Even if the Court should find after an evidentiary hearing on entitlement that the imposition of fees and costs as a term and condition is appropriate, it must make numerous factual determinations to decide the reasonableness of the fees, their relation to the tributary claim, their necessity, whether the work product would be useful in a subsequent tributary case, the existence of duplication and the appropriateness of applying Rule 41(d) C.R.C.P. to the circumstances of this case. There is no question but that a claim of the magnitude suggested by the Objectors in their answer brief to the motion to dismiss will result in disputed factual issues requiring an evidentiary hearing. *See, e.g., Siberman v. Bogle,* 683 F.2d 62 (3rd Cir., 1982); *Fitzpatrick v. Internal Revenue Service,* 665 F.2d 327 (11th Cir. 1982). To avoid unnecessary time and expense, the Court should conduct the entitlement phase of the hearing first, and stay discovery and hearing on the computation phase pending a determination as to entitlement.

5. The standards set forth in § 13-17-103, 6A C.R.S. (1987) would also be applicable in the evidentiary hearing. Under the application of those standards, Objectors would not be entitled to a recovery of attorneys fees. Based on the language of the statute requiring consideration of factors such as availability of facts, the effort

made to determine the validity of the claim, the absence of bad faith, and the right to pursue contracts to the close of evidence, these standards will establish that an award of fees is inappropriate. In the present matter, an evidentiary hearing would establish that the determinative facts were incontravertible and there was a valid right to pursue the tributary claim in good faith.

6. Although Applicant contests any entitlement of the Objectors to an award of fees and costs, the burden of proof still rests with the Objectors in proving such a claimed entitlement and the reasonable amount thereof. *W. L. Gore & Associates, Inc. v. Oak Materials Group, Supra,* at 702. American Water is entitled to reasonable discovery to meet the opponents' proof and to put on its own proof. Id.

7. A claim to attorneys fees and costs and the reasonableness thereof raises new issues of fact in this matter and no discovery has been had thereon. Such discovery is essential for a fair disposition of these issues.

8. The opponent of a fee petition is entitled to take discovery of the fee petitioner in order to appraise the reasonableness of the fee request. *National Assoc. of Concerned Veterans v. Secretary of Defense,* 219 App. D.C. 94, 675 F.2d 1319, 1329 and n.5 (1982), *Stastny v. Southern Bell Tel. & Tel. Company,* 77 F.R.D. 662 (W.D. N.C. 1978).

9. In order to facilitate an efficient disposition of the issue concerning fees, Applicant requests this Court to enter an Order requiring all the Objectors claiming such an entitlement to submit a written pleading in the form of a motion or claim, supported by legal authority, detailing any and all claims and the amount and justification for

each claim. This initial pleading shall provide a framework for subsequent discovery regarding the issue of fees and costs, as well as notice to American Water of all claims asserted by Objectors, so it can formulate its answer and defenses. American Water should have a minimum of 20 days in which to answer.

10. Applicant requests that this Court authorize discovery by the Applicant, including interrogatories, requests for admissions, requests for production of documents, and depositions against the Objectors regarding the issue of fees and costs, but limited solely to issues raised in the pleadings. By making a claim for attorneys fees, the Court should deem the Objectors to have waived with respect to all matters related to bills, time records and other supporting documents.

11. Applicant would request this Court to enter an order allowing 60 days from the date Objectors file their claims in which to complete discovery on the Objectors' claim pleading subject to extension upon a showing of good cause or in the Court's discretion.

12. The Objectors are not entitled to recover any fees which were incurred in discovering information in researching and pressing legal arguments that were *useful* in the nontributary claim that actually proceeded to trial. *McCants v. Ford Motor Co.*, 781 F.2d 855 (11th Cir. 1986), appeal after remand 789 F.2d 1539 (11th Cir. 1986). Rather, courts require a fee opponent to reimburse a fee petitioner for only that " . . . *portion* of his expenses of litigation." which are related to the dismissed claim. (Emphasis added.) *Id.* at 860.

13. Further, the Objectors are not entitled for reimbursement for any expenses incurred in preparing work product that was *or will be* useful in future litigation. *McLauqhlin, et al. v. Cheshire,* 219 App. D.C. 257, 676 F.2d 855 (1982); *Radiant Technology Corp. v. Electrovert U.S.A.,* 122 F.R.D. 201 (N.D. Tex. 1988). If dismissal is conditioned on payment of fees, the amount must be limited to compensation for work which cannot subsequently be used. *Taragan v. Eli Lilly and Co.,* 838 F.2d 1337 (D.C. Cir. (1988); *Cauley v. Wilson,* 754 F.2d 769 (7th Cir. 1985).

14. The mere fact that Objectors incurred attorneys fees and expenses in opposing Applicant does not entitle them to an award of fees. *Aggregates, Inc. v. Kruse,* 134 F.R.D. 23 (D. Puerto Rico 1991).

15. In discussing a case wherein it was alleged that a legitimate reason for dismissal without prejudice had not been offered, the United States Court of Appeals for the Seventh Circuit stated:

> The [Objectors] have fought the [Applicant] every possible inch of the way for over six years in court concerning the validity of the proposed . . . action. . . . A major reason why the . . . problem has not been resolved at this point in time is the continuous and protracted litigation of the case. While we do not fault the [Objectors] for exercising their constitutional right to defend this action in the manner they believe is most appropriate, it is "too late in the day" for them to complain that they somehow have been prejudiced by the delay in this case in proceeding to trial for they actively participated in this litigation . . .

United States v. Outboard Marine Corp., 789 F.2d 497 at 504 (7th Cir. 1986), *cert. denied* 479 U.S. 961 (1986).

16. Due to the complex nature of the claims, the common applicability of substantially all research and expert witness testimony to both the nontributary and tributary claims, the type and number of experts involved, the Court's prior allocation of discovery costs, and the number of parties and attorneys involved, the Objectors' claim for fees and costs cannot be treated like a garden variety attorney fee claim. The necessity to decide complex factual issues and the potential magnitude of the claims mandate that the Applicant be afforded the full range of due process rights, including full and adequate notice of the claims, a full and fair opportunity to respond and prepare for an evidentiary hearing, including the right to reasonable discovery and adequate time to analyze the claims, respond and prepare for the evidentiary hearing.

WHEREFORE, American Water respectfully requests the Court to enter an order granting its motion for the establishment of its due process rights in the form attached hereto.

Respectfully submitted this 1st day of November, 1991.

DISTRICT COURT, WATER DIVISION 3, COLORADO

Case No. 86CW46

APPLICANT'S REPLY

CONCERNING THE APPLICATION FOR WATER RIGHTS OF AMERICAN WATER DEVELOPMENT, INC.,

IN ALAMOSA, CONEJOS, COSTILLA, HINSDALE, MINERAL, RIO GRANDE AND SAGUACHE COUNTIES.

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Exhibit "A" – Transcript of October 10, 1991 Hearing [excerpt, see A-360-361]
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I. INTRODUCTION

Applicant American Water Development, Inc. ("Applicant" or "American Water"), by and through its undersigned counsel, hereby files this Reply to Objector's Response to Applicant's initial motion in this matter for an order granting Applicant due process in the form of notice, evidentiary hearing, discovery, and establishing issues and procedures for conducting a hearing regarding the award of fees and costs, if any. American Water seeks a full evidentiary hearing so that it may ascertain the factual and legal bases for defenses to any award of attorneys[1] fees and costs, in order to guarantee that American Water's due process rights are protected. Attached to this Reply is Applicant's offer of proof which demonstrates to the Court the necessity for issuing an order requiring procedures to ensure that the Applicant is afforded due process in the determination of the fees and costs issue through an evidentiary hearing including discovery. (Exhibit B.)

II. REPLY BRIEF

A. American Water's Initial Motion for Evidentiary Hearing and Due Process of Law.

On November 4, 1991, Applicant filed its due process motion ("Motion") for an order for adequate notice, an evidentiary hearing, discovery, and establishment of issues and procedures for determining the right to costs and fees as a term and condition for voluntary dismissal

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[1] The term "attorneys' fees" appears throughout, by editorial design, without the use of a possessive apostrophe.

of its tributary claim. The factual background leading to the filing of the Motion was set forth in Applicant's Motion and is known to the Court.

In Applicant's Motion, it was noted that the Court had stated at the pretrial conference in September 1991, that the dismissal of Applicant's tributary claim would be granted but that terms and conditions of that dismissal would be imposed by the Court, including an award of costs and fees, presumably including attorneys fees, to the Objectors. Applicant's Motion, however, pointed out that the American Rule governs in cases such as this requiring that each side pay its own attorneys fees (*see, e.g., Bass v. United States,* 379 F. Supp. 1208 (D. Colo. 1974), except under specific substantive statutes allowing recovery. The Motion further asserted that the Motion to Dismiss was filed pursuant to Rule 41(a)(2), C.R.C.P., only as a means of fulfilling Applicant's obligation under Rule 11, C.R.C.P., and § 13-17-102, C.R.S. (1987). Applicant's Motion further stated that Applicant would be denied its due process rights unless an opportunity by means of an evidentiary hearing was afforded in order to present evidence as to the appropriateness of an award of fees and costs, as well as to present evidence with respect to the applicability and reasonableness of any costs or fees claimed by Objectors to be attributable to the dismissed claim. Applicant noted that it is the Objector's burden of proof to establish entitlement and reasonableness of amounts claimed. While the Court seems to acknowledge the necessity of a hearing on the reasonableness of fees claimed, it has overlooked the more fundamental issue of the application of Colorado's Rule 11 and § 13-17-102, C.R.S.

The law expressly provides that no award of fees shall be made in circumstances such as those in the present case. *See* Part B, below. Applicant requested that the Court enter an order requiring Objectors to file a bill of costs as soon as possible, and that Applicant would respond to such bill of costs within 20 days. Further, Applicant requested the Court to allow 60 days, running concurrently with the aforementioned 20 day period, to conduct discovery on the factual basis for the bill of costs as well as its reasonableness. Applicant further asked the Court to declare that Objectors have waived any claim of privilege with respect to any material or opinions which comprise the bill of costs. To date, American Water has received no documentation from Objectors in support of their claims. Under these circumstances, it would not be possible for Applicant to review and respond to claims which could well total hundreds of thousands, if not millions of dollars, within the short time period of one or two days suggested by the Court.

B. Attorneys Fees and Costs Appropriate Only Under Certain Conditions

1. Discussion of American Rule.

Objectors appear to contend that they are "presumed" to be entitled to fees based on the fact that Applicant dismissed its tributary claim. Such contention, however, ignores the long-standing rule ("American Rule") that absent a specific statute or enforceable contract, litigants pay their own attorneys fees. *See Shields v. Shelter,* 120 F.R.D. 123 (D. Colo. 1988); *Bass v. United States,* 379 F. Supp. 1208 (D. Colo. 1974); *Andrews v. Blue,*

489 F.2d 367 (10th Cir. 1973); *Amerine National Corp. v. Denver Feed Co.*, 493 F.2d 1275 (10th Cir. 1974).

Defendants are not entitled to an award of attorneys fees as an automatic consequence of dismissals. *See Weir v. Lehman Newspapers, Inc.*, 105 F.R.D. 574 (D. Colo. 1985) (motion to dismiss for lack of subject matter jurisdiction); *Robinson v. C.R. Laurence Co., Inc.*, 105 F.R.D. 567 (D. Colo. 1985) (motion to dismiss for failure to state a claim). Merely because a party is forced to respond to a legal action does not entitle the party to an award of fees where the opposing party does not proceed unreasonably, vexatiously, or frivolously. *See Polger v. Republic National Bank*, 709 F. Supp. 204 (D. Colo. 1989). Therefore, for the Court to impose any award, it must first find that an exception to the American Rule exists. The Objectors have ignored this aspect of Applicant's Motion. Unless there are special circumstances, or unless an express statutory provision controls, the American Rule governs the issue of attorneys fees and costs.

Objectors assert that it is Applicant's position that it is not within the discretion of the Court to impose an award of attorneys fees and costs absent a finding of bad faith. This, however, is a mischaracterization of the Applicant's position. As discussed *infra*, bad faith is only one factor to be considered. Moreover, the Objectors base their entire argument on the fact that the Court may exercise its discretion. However, the Objectors fail to address any of the restrictions placed on the Court's discretion as raised by Applicant. Applicant does not maintain that the Court is unable to impose terms and conditions that are just pursuant to a Rule 41(a)(2) dismissal. However, Applicant does argue assuming,

arguendo, that an award is appropriate, certain guidelines and procedures must be followed. The Court's ability to impose an award of fees and costs is controlled by the procedural and statutory mandates relied upon by Applicant.

2. Rule 11, C.R.C.P., Prohibits Attorneys Fee Award.

Rule 11 of the Colorado Rules of Civil Procedure has been amended to restrict the Court's ability to impose attorneys fees where a voluntary dismissal is filed " . . . within a reasonable time after the attorney or party filing the pleading knew, or reasonably should have known, that he would not prevail on said claim, action, or defense." The Federal Rule 11 does not include this language. For this reason Objectors' reliance on federal cases construing the Rule is wholly misplaced. Applicant relies on federal cases in other instances where there is *no substantive difference* between application of state and federal rules. As set forth in Applicant's Reply Brief in Support of Motion to Dismiss Claims Set Forth in Part IV of the amended application, dated October 10, 1991, Applicant had the right to pursue contractual negotiations until the close of evidence. As further stated in the attached Offer of Proof, Applicant pursued such contractual negotiations in good faith until it became clear that it would be unable to obtain such contracts within the required time frame. Upon this realization, Applicant withdrew its tributary claim in a timely manner. Rule 11 expressly encompasses the circumstances of this case and precludes an award of attorneys fees.

3. Mandatory Considerations of Section 13-17-102, C.R.S.

Should the Court impose attorneys fees and costs in spite of the prohibition of Rule 11, C.R.C.P., it must follow appropriate guidelines and procedures in making such award. In §§ 13-17-102 and 103, C.R.S., factors are imposed which *must* be considered by the Court in *any* award. The Court has made a preliminary indication that it has made fees and costs awards prior to the case at bar and does not feel that the case at bar is materially different in this aspect. In the examples cited by the Court, however, (e.g., domestic law; *see* § 14-10-119, C.R.S.), a specific statute mandates or allows for such imposition. In their Response, Objectors seem to argue that the Court may simply impose any terms and conditions without a hearing as a matter within the Court's sole discretion. While the decision to impose terms and costs certainly is within the Court's discretion, such discretion is not unfettered. Rather, only proper terms and conditions may be imposed. The express language of Rule 41(a)(2) indicates that further inquiry is necessary as opposed to a simple blanket imposition. Notwithstanding Colorado Rule 11, there are specific statutes in Colorado which govern and allow the award of attorneys fees.[2] Absent a specific

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[2] Colorado Revised Statutes provide specific instances where attorneys fees may be awarded: *See, e.g.,*

– § 5-5-202 (award for successful prosecution of action under Colorado Consumer Credit Code);

– § 6-1-113 (authorizing recovery of fees against persons engaging in a deceptive trade practice);

provision, the Court must look to the general existing provision. where specific statutes govern and allow awards of attorneys fees and there are standards set forth in a general statute for such awards, then general rules of construction militate against an award except through those provisions. *Expressio unius est exclusio alterius.* Section 13-17-102(5), C.R.S., mandates that no fees shall be assessed where a voluntary dismissal is filed within a reasonable time after the filing party knew or should have known that it would not prevail. Section 13-17-103 states that, in the event that an award is appropriate, in exercising the court's discretion, a court *shall consider* the following factors:

> (a) The extent of any effort made to determine the validity of any action or claim before said action or claim was asserted;

– § 7-70-110 (fees allowed to persons damaged by fraudulent registration of trademark);

– § 11-51-604 (governing an award for violation of Colorado Securities Act);

– § 12-6-122 (allowing recovery of fees for successful prosecution of action under Colorado Automobile Dealer Licensing Act);

– § 12-14-113 (providing for recovery of fees for violations of Fair Debt Collection Practices Act);

– § 12-44.5-108 (award for successful prosecution of action under Indian Arts and Crafts Sales Act);

– § 13-40-123 (fees allowed to landlord in forcible entry and detainer action);

– § 14-10-119 (providing for an award of attorneys fees in domestic relations cases);

– § 34-60-118.5 (governing award for failure to pay royalties under Oil and Gas Conservation Act; and

– § 35-38-108 (fees allowed to persons damaged by violation of Farm Equipment Fair Dealership Act).

(b) The extent of any effort made after the commencement of an action to reduce the number of claims or defenses being asserted or to dismiss claims or defenses found not to be valid within an action;

(c) The availability of facts to assist a party in determining the validity of a claim or defense;

(d) The relative financial positions of the parties involved;

(e) Whether or not the action was prosecuted or defended, in whole or in part, in bad faith;

(f) Whether or not issues of fact determinative of the validity of a party's claim or defense were reasonably in conflict;

(g) The extent to which the party prevailed with respect to the amount of and number of claims in controversy;

(h) The amount and conditions of any offer of judgment or settlement as related to the amount and conditions of the ultimate relief granted by the court.

Relating the above factors to the facts of this case militates against any award of attorneys fees.

4. Consideration of Rule 41(d), C.R.C.P.

The dismissal of this action was requested pursuant to Rules 11 and 41 of the Colorado Rules of Civil Procedure. One of the express terms of Rule 41 addresses yet

another alternative for the Court in imposing costs of a previously dismissed action. Pursuant to Rule 41(d):

> If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

The foregoing provision explicitly recognizes that imposition of terms and conditions may be inappropriate absent a finding of legal prejudice to the plaintiff. The ambit of Rule 41(d) has been held to encompass fees as well. *Evans v. Safeway*, 623 F.2d 121 (8th Cir. 1980) (per curiam).

In the present case, Applicant moved to dismiss its tributary claim upon its realization that it would not consummate contracts with end users before the time of close of evidence in the trial. Nevertheless, negotiations with users continue at the present time and a subsequent tributary claim will in all probability be filed. If a subsequent claim is not filed, then the Objectors have achieved their goal and the American Rule applies, rendering any award improper. In any event, an award of fees and costs would be premature because any and all efforts in opposing the tributary claim will be directly useful and applicable in opposition in any subsequently filed tributary claim by Applicant or other party. Pursuant to Rule 41(d), if the Court contemplates awarding fees and costs in this voluntary dismissal action, it should do so only when a subsequent tributary claim is filed. In any event, any

award eventually made could not include amounts attributable to work or efforts useful in opposing a subsequent claim.

5. Awards Based Standard of Reasonableness.

Finally, the Court is restricted to time *reasonably spent* as compensable, not time *actually spent*, and that time spent which was subsequently useful is not compensable. *McLaughlin, et al. v. Cheshire*, 219 App. D.C. 257, 676 F.2d 855 (1982). As discussed *infra*, the reasonableness of an award in the present case raises factual issues upon which there has been no discovery or record established before this Court. Given the amount to be claimed, full development of the reasonableness of any award is especially mandated in this case. *See Silberman v. Boyle*, 683 F.2d 62 (3rd Cir. 1982); and *Fitzpatrick v. I.R.S.*, 665 F.2d 327 (11th Cir. 1982).

C. Applicant's Reply to Objectors' Response.

1. Entitlement is Disputed.

Objectors state that Applicant's motion merely reargues the correctness of the Court's prior ruling to award costs and fees, presumably including attorneys fees, in this matter. In fact, Applicant's motion argues that it is both improper and erroneous to award attorneys fees or costs in the present circumstance, because to do so would be in clear contravention of the American Rule, Applicant's compliance with Colorado's language in Rule 11, C.R.C.P., and the statutory scheme established in the Colorado Revised Statutes at § 13-17-102, *et seq.* The

Objectors' reliance on federal case law is inappropriate in the face of the clear, unequivocal language of Colorado Rule 11 and Colorado statutes, the enactment of which was subsequent to the adoption of Rule 41(a)(2) and which provisions preempt any basis for holding that Rule 41 can act as an independent ground for an award of attorneys fees.

2. Due Process is Required.

Objectors allege that the right to an evidentiary hearing in such matters is without foundation. This is a bewildering statement in that there is a significant body of law which unequivocally states that a fee opponent is entitled to due process of law including a full evidentiary hearing, as well as the right to inquire and discover the efficacy and relevancy of the fee claim being made. This legal right is discussed in detail with supporting case law at Part D, below. Contrary to Objectors' allegation, all the cases cited below in fact concern actions for awarding fees and costs.

Objectors further allege that to have a procedure which would guarantee due process of law would only protract and complicate these already costly proceedings. In reply, first, the issue of an award of costs and fees as terms and conditions for the dismissal of the tributary claim is a separate matter from the presently ongoing water court trial. It is essentially a trial on a claim for damages by the Objectors. Second, the due process sought by Applicant need be neither unnecessarily extensive nor costly, but it must reflect the complexity of

having to allocate costs between nontributary and tributary claims, as well as the magnitude and reasonableness of such claims. Objectors essentially argue that expediency takes precedent over a fair and just resolution of the matter.

3. Objectors Misstate Purpose of Rule 41(a)(2), C.R.C.P.

Objectors allege that the purpose of Rule 41(a)(2), C.R.C.P., is for the protection of Objectors. In the present case, the Court has determined that no legal prejudice will inure to the Objectors because it dismissed the tributary claim without prejudice. The cases cited by Objectors are cases wherein the courts attempted to protect defendants from legal harm, not to award fees because plaintiffs sought a voluntary dismissal.

Objectors assert that Rule 41(a)(2) grants the Court a basis independent from other rules of civil procedure or from the Colorado statutes for the Court to award attorneys fees. First, Rule 41(a)(2) provides a court with the power to impose terms and conditions in the event of a voluntary dismissal of a claim in order to avoid legal prejudice to the Objectors. No legal prejudice will occur to Objectors as a result of the dismissal of the tributary claim. In fact, dismissal of the tributary claim was the clear goal of the Objectors in filing statements of opposition to American Water's application. Thus, instead of legal prejudice, legal protection has been achieved. Rule 41(a)(2) stands *in pari materia* with other rules of civil

procedure and with those statutes which specify the substantive requirements necessary to impose costs and fees in certain circumstances.

We've been unable to find, and Objectors have not cited, any cases where voluntary dismissal was the sole basis for the award of fees and costs. In every such instance where fees were awarded, there were underlying grounds such as legal prejudice or vexatious behavior. The mere fact that a party incurs attorneys fees and expenses in defending a lawsuit does not entitle the party to an award of fees. *Aggregates, Inc. v. Kruse,* 134 F.R.D. 23 (D. Puerto Rico 1991).

Objectors are correct in stating that voluntary dismissal under Rule 41(a)(2) is not accompanied by a statutory directive for the award of attorneys fees and costs. (Refer to Objectors' Response.) Without such an independent substantive basis for making an award of fees as an exception to the American Rule, no attorneys fees can be awarded contrary to provisions of Rule 11 and § 13-17-102. Subsection (5) and the rule require that *no* attorneys fees shall be assessed in this case.

4. Procedure Requires Evidentiary Hearing.

The cases upon which Objectors rely for their contention that no evidentiary hearing is required are distinguishable legally, and involve factual situations readily distinguishable from those of the present case.

In *San Juan Products, Inc. v. San Juan Pools of Kansas, Inc.,* 849 F.2d 468 (10th Cir. 1988), a trademark contest under 15 U.S.C. § 1125(a), the U.S. District Court for the

District of Kansas found that plaintiff's action was "utterly frivolous" and awarded attorneys fees and costs to defendants. In absence of a statutory provision for frivolous and groundless action like the Colorado statute, the trial court was compelled to exercise its equitable power to award fees to punish the plaintiff under the "bad faith" exception to the American Rule. There is no reference to Rule 54(d) which deals only with costs, not attorneys fees.

> The court awarded attorney fees based on its inherent equitable power. We presume the court was relying on the recognized exception to the American Rule, *see Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975), that when an unfounded action is brought or maintained in bad faith, wantonly, vexatiously or for oppressive reasons, the court may arm itself with "the power of the equity judge to do justice." 6 J.Moore, *Federal Practice* ¶ 54.-78[3], at 500 (2d ed. 1987). We have stated that to fall within the bad faith exception the claim must be entirely without color and asserted wantonly, "for purposes of harassment or delay, or for other improper reasons." *Sterling Energy, Ltd. v. Friendly Nat. Bank*, 744 F.2d 1433, 1435 (10th Cir. 1984) (quoting *Browning Debenture Holders' Committee v. DASA Corp.*, 560 F.2d 1078, 1088 (2d Cir. 1977)).

San Juan, 849 F.2d at 476. This case supports Applicant's position that to award or justify an award of attorneys fees there must be an underlying statute or a recognized exception to the American Rule before fees may be awarded.

Objectors also rely on this case to assert that it is not an abuse of discretion to determine an amount of an award in an "in-chambers" hearing. But a review of the facts indicate that in this case due-process was afforded:

> On appeal, San Juan objects to the manner and substance of the award of attorney fees. San Juan contends the court awarded the entire amount of fees requested without holding a formal, noticed hearing in open court. The record contradicts this assertion.

San Juan, 849 F.2d at 475.

In *San Juan*, the fee-opponent had over five months to contest the plaintiff's claim. *San Juan*, 849 F.2d at 475-476. Presumably, the ability "to contest" the claim included the right to seek clarification and verification of items contained in the claim through discovery. Having failed to capitalize on this opportunity, the Court found that San Juan's due process rights were not violated.

Objectors next claim that fee awards may be made based on affidavits and memoranda, without discovery or hearing, citing *Radiant Technology Corp. v. Electrovert USA Corp.*, 122 F.R.D. 201 (N.D. Tex. 1988). However, *Radiant Technology* is not analogous to the present situation. *Radiant Technology* involved a patent infringement claim wherein a virtually identical suit had been filed in a different district and dismissal was sought of the initial action. However, *Radiant Technology*, a decision by a Texas U.S. District Court, appears to be aberrant based on the Court's own acknowledgement in n. 5 on page 204 that it does follow the convention in other jursidictions [sic]. The amount at issue appeared to be minimal because parallel actions were pending and work in cases would be

applied in the other cases. Also, the Court provided an unusual smorgasbord of remedies, including some with no fees. The opinion does specifically reference the Lanham Act as a basis for awarding fees, which contains various provisions for awarding fees. 15 U.S.C. §§ 1117, 1120. To the extent the opinion suggests that a hearing is not necessary, it is contrary to all other law on the subject, and even the Objectors do not suggest that this Court forego an evidentiary hearing altogether as the Texas court did.

As discussed in Applicant's Motion and this Reply, substantial monetary amounts, material factual disputes, and a request for a hearing are precisely the types of factors that *mandate* a hearing. Furthermore, there is no way of knowing what the courts involved in cases cited by Objectors would have done had complexities such as those present here been presented to them in affidavits. The legal holdings consistently were that terms and conditions of a dismissal are designed to alleviate legal prejudice or legal harm.

Finally, Objectors assert that they do not object to the procedure used in *Shulley v. Mileur,* 115 F.R.D. 50 (M.D. Pa. 1987). There the court granted the fee claimant 20 days to submit the customary itemization, and the fee opponent was allowed 15 days to respond to the reasonableness of the amount. The *Shulley* case involved wrongful interference with a franchise option. A conditional dismissal was granted whereby the fee opponent could have proceeded to trial had it been dissatisfied with the award. The legal holding was directed towards the issue of legal prejudice and prevention thereof. There is no indication that *Shulley* involved a substantial

amount, material factual disputes, or a request for a formal hearing.

Objectors assert "[t]he Court will be supplied with adequate information in the form of affidavits and billing statements prior to the hearing, and Applicant will have an opportunity to question Objectors concerning the nature and extent of matters for which payment is sought." (Objectors' Response.) Certainly, the Court should not rely on one party's definition of the adequacy of the information supplied. But, accordingly Objectors allow that Applicant will have an "opportunity to question" on the information supplied. For questioning to be effective, the responses must be made under oath. For the information about billings to be adequate, each billing claimed must withstand inquiry about its reasonableness under the circumstances, its relationship to the tributary claim, its utility in defending against Phase I or Phase II of the nontributary claim, whether it contributes to "legal prejudice" against the Objector, and whether the expense was necessary given the scope and status of Applicant's claim at the time the expense was incurred. All the cases cited by the Objectors lack the complex allocation and other factual issues present here.

D. Full Evidentiary Hearing Needed to Determine Reasonableness of Amounts Claimed.

1. Material Factual Issues Are Disputed.

Any award of fees and costs must be predicated upon a reasonable basis. A degree of scrutiny is required to establish reasonableness. Because of the complex facts,

allocation between claims and the substantial amounts of fees and costs involved in the present case, a high degree of scrutiny is required.

At a minimum, such scrutiny would require analysis of the following:

- Whether time claimed is reasonable; what time was reasonably spent in defending the tributary claim that was not useful in the case that proceeded to trial.
- At what point in time did the Objectors subjectively believe that Applicant could not prevail on its tributary claim.
- Any duplication of effort (especially as more than one attorney is involved in this case).
- Establishing reasonable local rates for attorneys, paralegals, expert witnesses, etc.
- Whether the time spent in preparation of pleadings or discovery will be useful in Phase II of this case or other similar cases, subsequently filed by Applicant or others.
- Whether non-legal chores were performed by legal staff and the appropriate rate therefor.
- Whether the entire fees sought were actually imposed upon the Objectors' clients.
- Whether the Objectors are able to produce contemporaneous time records or are relying on reconstructed time records.
- The novelty of the case involved.
- Whether discovery procedures employed were reasonable.

- The Objectors' counsel's charges for clients in other similar actions.
- Scrutinization of expert witness fees, including the issue of whether expert witness testimony was justified.
- Whether the hourly rates claimed have changed as the litigation has been protracted over a number of years.
- Whether any of the tasks performed by attorneys could have been performed by law clerks or paralegals.
- Whether Objectors are entitled to any fees incurred after they became aware of the nonexistence of the "end" contracts necessary for a tributary claim (refer to discussion of duty to mitigate *infra*).
- Whether there was any overlap on the time spent on the tributary and nontributary claim.
- Background and qualifications of the Objectors' experts.
- How much of the time billed was spent on "nonessential" tasks (i.e., travel and telephone).
- Whether the present employment of the Objectors' counsel has led to any other employment.
- Whether Objectors' counsel bills by quarter-hours or tenth-hours.
- Whether any work billed for was based other than on an hourly rate.

The foregoing list is a clear indication of the number of factual issues involved which could be in dispute. An evidentiary hearing *must* be held when questions of material fact are disputed in a fee application. *Silberman v. Boyle*, 683 F.2d 62, 64 (3rd Cir. 1982); *Fitzpatrick v. I.R.S.*, 665 F.2d 327, 332 (11th Cir. 1982). This is especially true in cases of the magnitude and complexity of the instant case. *See Moore v. Mathews and Co.*, 682 F.2d 830 (9th Cir. 1982).

Examination of the fees and costs incurred in defending the tributary claim raises a host of factual issues upon which no discovery has been had. As stated, it is not actual time spent, but reasonable time spent that is compensated. Therefore, in order for any award to properly be made it must be determined what time was reasonably spent in opposing the tributary claim.

2. Objectors Failed to Mitigate the Fees and Costs in Defending the Tributary Claim.

Applicant maintains that the Objectors have failed to mitigate their fees and costs and have needlessly allowed them to escalate. An attorney fee applicant is charged with an affirmative duty to mitigate the attorneys fees incurred in an action. By failing to do so, the fee-applicant is subject to having its claim for fees substantially reduced or denied. This principle is well recognized in both the Colorado and federal courts.

The trial court in *Ruffing v. Lincicome*, 737 P.2d 440 (Colo. App. 1987), concluded that the full amount of attorneys fees requested by the defendant should not be allowed because he *could have mitigated* such fees by

terminating the litigation prior to trial via summary judgment. The trial court reasoned that, given the facts of the case, the defendant would almost certainly have prevailed on such a motion. By failing to file a motion for summary judgment, the defendant incurred attorneys fees far in excess of the amount reasonably necessary to defend the claims against him. On appeal, the defendant argued that the concept of mitigation could not be applied to reduce the amount of attorneys fees sought by a party even though the party has reason to believe early on in the proceedings that a particular claim asserted by an opponent is meritless. The Court of Appeals disagreed:

> [I]t is within the discretion of the trial court to limit its award of attorney fees based on a finding that a party did not take all reasonable measures to extricate himself from a frivolous or groundless lawsuit at the earliest possible time.

Ruffing, 737 P.2d at 442.

In this case it is clear from statements made by John R. Hill, counsel for U.S. Department of Justice, at the time Applicant made its motion to dismiss its tributary claim, that it was always the intent of the Objectors to litigate the tributary claim so as to end this issue forever "on the battlefield while you have them decisively engaged rather than let them get away to fight another day." Transcript of pretrial hearing on October 10, 1991, at pp. 53-54, attached as Exhibit A. In *Ruffing* the defendant also challenged the lower court's ruling on the basis that it improperly allowed the trial court to invade the province of counsel to decide how a case should be tactically

managed. The Court of Appeals pointed out, however, that:

> A party does not have an absolute right to attorney fees incurred, but rather is entitled only to the reasonable attorney fees which the court, in its discretion, deems just. Thus, there is no guarantee, regardless of how a case is managed, that attorney fees will be awarded. The result the trial court reached in this case merely encourages counsel to consider the most expeditious alternatives when making strategic decisions.

Ruffing, 737 P.2d at 442. This same principle is additionally recognized in § 13-17-103(1), C.R.S., which mandates consideration of any effort made to dismiss or reduce the number of claims asserted. The fact that the Objectors chose to litigate the tributary claim rather than mitigate their fees and costs prevents an award of fees and costs that could have been mitigated. *See Thomas v. Capital Security Services, Inc.*, 836 F.2d 866 (5th Cir. 1988), where the court discussed, at length, the rationale underlying the mitigation principle as applied to attorneys fees:

> Permitting or encouraging the opposing party to litigate a baseless action or defense past the point at which it could have been disposed of tends to perpetuate the waste and delay which the rule is intended to eliminate. It also undermines the mitigation principle which should apply in the imposition of sanctions, limiting recovery to those expenses and fees that were reasonably necessary to resist the offending paper. In assessing the damage done, the court should consider the extent to which it is self-inflicted due to the failure to mitigate. If a baseless claim could have readily been disposed of

> by summary procedures, there is little justification for a claim for attorneys' fees and expenses engendered in lengthy and elaborate proceedings in opposition. The rule's purpose would be frustrated if it encouraged the offended party to play the very game at which it is aimed.

Thomas, 836 F.2d at 879, n. 19. *See also Leffler v. Meer*, 936 F.2d 981, 987 (7th Cir. 1991); *Jackson v. Law Firm of O'Hara, Ruberg, et al.*, 875 F.2d 1224, 1230 (6th Cir. 1989), *reh. denied* (1989); *Napier v. Thirty or More Unidentified Federal Agents*, 855 F.2d 1080, 1092 (3rd Cir. 1988); *Oliveri v. Thompson*, 803 F.2d 1265, 1280 (2nd Cir. 1986), *cert. denied*, 480 U.S. 918 (1987).

3. A Party has a Further Duty to Mitigate Costs by Focusing on the Elements of the Claims.

The Objectors had a duty to mitigate costs by not over-staffing, over-researching, or over-discovering in this case. *See White v. Gen. Motors Corp., Inc.*, 908 F.2d 675 at 684 (10th Cir. 1990), *cert. denied*, 1991 U.S. LEXIS 612 (1991). *See also Leffler*, 936 F.2d at 987. The Objectors are not entitled to recover attorneys fees and costs resulting from abusive discovery procedures employed by Objectors to accomplish goals unrelated to the opposition to Applicant's application. For example, Objectors deposed any potential investors contacted by Applicant under the guise of the "can and will" test, but the transcripts of the depositions reveal that they were used to deliver what Objectors considered adverse aspects of Applicant's project and the magnitude and intensity of the opposition, all to discourage investors from participating in the project. Attorneys fees and costs must be related only to the

presentation of meritorious defenses against Applicant's claims. *See Leffler, supra* at 987.

Although cited cases deal with an invocation of a trial court's authority to impose attorneys fees pursuant to statute (§§ 13-17-101, *et seq.*, C.R.S.) or court rule, the reasoning applied in these cases is applicable to any situation where an assessment of a "reasonable amount" of attorneys fees must be made. *See Ruffing*, 737 P.2d at 442 (§ 13-17-101, C.R.S., only allows award of "reasonable" attorneys fees); *White*, 908 F.2d at 684 (Rule 11 limited to payment of opposing party's "reasonable" expenses). Accordingly, the duty to mitigate attorneys fees applies to all claims for or awards of such fees, regardless of the basis for such claim or award.

III. CONCLUSION

Rule 41(a)(2), C.R.C.P., does not establish an independent basis for an award of attorneys fees and costs. Colorado follows the American Rule, absent an express statutory or contractual provision, neither of which are present in this case. Moreover, in the present case, Colorado Rule 11 specifically precludes an award of attorneys fees. In the event that the Court were to make a finding contrary to the American Rule and award fees and costs, said award must be just and reasonable. Reasonableness in a complex case such as this can only be determined through a full evidentiary hearing after discovery procedures have been conducted.

WHEREFORE, Applicant American Water Development, Inc., respectfully requests this Court to grant its request for due process including a full evidentiary hearing.

RESPECTFULLY submitted this 22nd day of November, 1991.

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EXHIBIT A

(Excerpt from Transcript of October 10, 1991 Hearing)

* * *

MR. HILL: Thank you, Your Honor. Your Honor, the United States agrees with the position taken by the district and by the water users in all respects, and the United States also expressly reserves a right to pursue whatever remedies may be available under Rule 11.

I'd like to just address very briefly the argument that the applicants make in the brief they filed this morning on the issue of our failure to mitigate damages and any quote from a letter that I wrote to Mr. Ross saying that in

my opinion they were speculating when they started and they were still speculating, so we weren't interested in conducting any negotiations with them.

[p. 54] The point is that we did want a decision on the merits of the impact of their proposal on the federal interests in the Valley just as the other water users in this valley wanted a decision on the merits. So we didn't file a dispositive motion because a dismissal with prejudice, as has been discussed already, may not preclude them from coming back.

So it's perfectly legitimate to destroy the enemy on the battlefield while you have them decisively engaged rather than let them get away to fight another day. So any of this argument on cases that we had somehow a duty to mitigate damages is completely distinguishable by the fact that this is a water case, and the notion of a dismissal with prejudice doesn't necessarily mean what it means in an ordinary civil action, thank you, Your Honor.

* * *

EXHIBIT B

DISTRICT COURT, WATER DIVISION 3, COLORADO

Case No. 86CW46

OFFER OF PROOF IN SUPPORT OF APPLICANT'S REPLY BRIEF AND MOTION REQUESTING DUE PROCESS

CONCERNING THE APPLICATION FOR WATER RIGHTS OF AMERICAN WATER DEVELOPMENT, INC.,

IN ALAMOSA, CONEJOS, COSTILLA, HINSDALE, MINERAL, RIO GRANDE AND SAGUACHE COUNTIES.

Applicant American Water Development, Inc. (hereinafter "American Water" or "Applicant") by and through its attorneys, Saunders, Snyder, Ross & Dickson, P.C., hereby submits this Offer of Proof pursuant to Rule 103 of the Colorado Rules of Evidence and respectfully provides the following information by way of its Offer of Proof in support of Applicant's Motion (the "Motion") requesting due process and Applicant's appendant Reply Brief. In its offer of proof, Applicant would show unto the Court as follows:

A. Justification for Denial of Fees and Costs:

Purpose of Offer: Pursuant to Rule 11 C.R.C.P. and § 13-17-102 6A C.R.S. (1982), no attorneys' fees shall be assessed if a party or its attorney files a voluntary dismissal within a reasonable time after learning that he would not prevail on a claim or action. American Water

withdrew its claim within a reasonable time after it determined it could not meet the statutory requirements to perfect its intent to appropriate by the close of evidence on its case in chief. The evidence offered by American Water will support its compliance with the standards mandated by both the statute and the rule.

The statute and rule cited above together with applicable case law require an evidentiary hearing in order for the Court to make a factual determination as to whether such an award may lawfully be made in these proceedings. That law requires this Court first to determine whether Applicant's withdrawal was filed within a reasonable time after it first became aware that it could not produce evidence upon which it could prevail on its tributary claim by the close of its case. Should the Court, after reviewing the relevant evidence, hold that such a withdrawal was not timely, it must make a further factual inquiry to determine whether those who claim the right to receive such fees and costs could have avoided incurring them, and if so, whether they failed and refused to take timely avoidance action on their own behalf. If they could have, but did not, their claim would also be defeated.

In support of its position that its withdrawal was timely, Applicant makes the following offer of proof:

1. If the witnesses Dale Shaffer and Robert C. McWhinnie are permitted to testify, the substance of their testimony will be:

a. That Applicant had negotiated over a considerable period of time in good faith with representatives of

a number of entities, including Jefferson County, Colorado and the City of Broomfield, Colorado for the execution of contracts Applicant believed would evidence statutory intent and in good faith, Applicant expected that such contracts could be executed prior to the close of Applicant's evidence at trial.

b. That as a result of discussions with the Board of County Commissioners of Jefferson County on September 18, 1991 and discussions with the City Council of the City of Broomfield on September 24, 1991, Applicant concluded that although Jefferson County and Broomfield had determined they wanted to enter into appropriate contracts with Applicant, the time required to resolve the complexities of a final agreement prior to execution would necessarily extend beyond the close of Applicant's evidence on Phase I of its application.

c. That within eight (8) days after the discussion with the Jefferson County Commissioners and within two days after the discussion with the Broomfield City Council Applicant authorized its Counsel to file its Motion to Withdraw its tributary claim. Such filing was within a reasonable time as required under § 13-17-102, 6A C.R.S. (1987) and Rule 11 C.R.C.P.

2. If an expert witness (to be determined) who will be a lawyer admitted to practice in Colorado who qualifies as an expert in the area of attorney fees and costs is permitted to testify, the substance of his testimony will address: 1) the reasonableness of the time of filing of Applicant's Motion to Withdraw its tributary claim; 2) the right of Applicant to rely on the plain language of Rule 11, C.R.C.P. and the clear intent of § 13-17-102 6A C.R.S.;

and 3) the right of Applicant to have an evidentiary hearing on the issues of both entitlement and reasonableness with adequate time for discovery to prepare for said hearing.

3. The foregoing testimony is material and competent and clearly relevant in that it relates to Applicant's compliance with statutory criteria. The testimony confirms that Applicant moved to dismiss its tributary claim within a reasonable time after Applicant concluded it would not prevail on its tributary claim and filed its motion to dismiss, taking into consideration Rule 11, C.R.C.P. and § 13-17-102, 6A C.R.S. (1987). Further the testimony will show that Applicant and its counsel reasonably relied upon the rule and statute as applicable to the withdrawal of Applicant's claim.

4. This Offer of Proof is made in writing as part of Applicant's Reply Brief to reveal the substance of the offered evidence to support Applicant's argument that the award of fees and costs in this instance would be contrary to Rule 11 and § 13-17-102(5), C.R.S., as such an award is an improper term and condition for the entry of an order granting Applicant's Motion to Withdraw its tributary claim since Applicant's Motion was timely filed and was in compliance with said rule and statute.

B. Objectors' Duty to Mitigate and Refusal to Do So:

The Objectors knew that contracts for perfecting the appropriative intent did not exist and if they believed in good faith that such a condition would defeat the Applicant's claim, the Objectors had a duty to mitigate their preparation costs by seeking dismissal of the claim through motion practice.

In support of its position that the Objectors knew of the lack of contracts, Applicant makes the following Offer of Proof:

1. If the witness Dale Shaffer is permitted to testify, the substance of his testimony will be:

a. That at a Colorado Water Congress annual meeting on or about January 28 and 29, 1988, in a conversation with Mr. John U. Carlson, attorney for the Rio Grande Water Users Association, Mr. Carlson stated that American Water was a speculator, that it did not have the necessary contracts, that the adjudication would go all the way through and make a lot of money for Mr. Carlson's law firm but that American Water would not get a drop of water from the proceedings.

2. Various discovery responses to interrogatories posed by both Objectors and Applicant show that the Objectors knew as early as March 30, 1988, and were reminded as late as October 9, 1991, that Applicant did not have such contracts to sell water and elected to use this fact at trial rather than as basis for summary judgment or other motion or action prior to trial; to wit: Pertinent responses of Applicant to specific interrogatories of Objectors as specified and responses of certain Objectors to specific interrogatories of Applicant are highlighted in the discovery responses attached hereto as Exhibits A, B, C, D, E and F and made a part hereof.

a. The earliest example of such discovery responses is taken from Exhibit A, being Applicant's responses to Objectors' Rio Grande Water Conservation

District's and Rio Grande Water Users Association's Second Set of Interrogatories and Request for Production of Documents dated January 26, 1988.

(1) Interrogatory No. 51: State whether there is any agreement of any kind between AWDI and BRC concerning BRC's use of TWSC Water outside the boundaries of the Baca Ranch and, if so, identify each such agreement and each document concerning each such agreement.

RESPONSE: No.

(2) Interrogatory No. 52: State whether there is any agreement of any kind between any persons, whether or not including the Applicant, concerning the transportation or distribution of Application Water and, if your response is anything other than an unqualified negative, identify each such agreement and each document concerning each such agreement.

RESPONSE: No.

(3) Interrogatory No. 53: State whether there has been development by or for the Applicant of any plan or proposal for the transportation or distribution of Application Water to places of beneficial use.

RESPONSE: As to Applicants' claim for tributary conditional water rights (Part IV of the Application), Applicants state that there has been no such development.

Date of response: March 30, 1988.

b. An interim example of such discovery responses is taken from the Rio Grande Water Users

Association's response to the Applicants' prior Discovery Requests. (Exhibit E hereto) as follows:

(1) Interrogatory No. 16. Regarding the allegations contained in your Statement of Opposition dated February 23, 1987, state the following: . . .

F. Each and every fact and reason why you allege that the Application is speculative.

(2) Supplemental Answer to Interrogatory No. 16F. The Applicant has no fixed and definite plan for the diversion of a specific amount of water for beneficial use, has no established use for the water claimed, and has no contractual commitments for the purchase of said water by others who will apply it to beneficial use. . . .

Date of response: February 12, 1990.

3. Not only were the Objectors aware of the lack of such contracts, they were making vigorous efforts to dissuade others from entering into such contracts. In response to requests to produce, the Rio Grande Water Conservation District produced copies of three letters sent for that very purpose to Denver Metropolitan area water providers, dated December 11, 1989 (see Exhibit G), August 23, 1990 (see Exhibit H), and February 21, 1991 (see Exhibit I).

4. During the latter part of January and early February, 1991, depositions by the Objectors also developed information about the then lack of contracts (see Exhibits J, K and L).

5. Finally, the litigation strategy of Objectors, most clearly articulated by Mr. John Hill, counsel for the

United States, was to refuse to seek to have the case resolved other than by a full scale trial.

In letter from John R. Hill, Jr., attorney for United States Department of Justice dated November 19, 1990 regarding this case (86CW46 Water Division No. 3) to Jack F. Ross, attorney for Applicant in which John R. Hill states as follows:

> Finally, and most important, I believe AWDI's application was speculative when filed and continues to be speculative. Despite being requested to do so in discovery, AWDI has failed to disclose or produce a single contractual commitment to use the water it proposes to transport to the Front Range. Therefore, as a matter of Colorado law, AWDI has no water rights for the court to confirm in these proceedings. It makes no sense to me whatever to negotiate over so-called "protective measures" to be included in a decree the prospects for which are extremely remote.
>
> It is in the foregoing context that I adhere to my position that negotiations would be fruitless and that the federal interests will be best served by defeat of the application.

The full text of that letter, together with the one to which it responds and the statement by Mr. Hill in corroboration of that position in open Court on October 10, 1991, are attached as Exhibits M, N and O.

6. If the persons answering the interrogatories in Exhibits A, B, C, D, E and F, the deponents in Exhibits G, H, I, J, K and L, and the managing agents of the Objectors are permitted to be examined or cross examined by Applicant under the rule (Rule 611(c) C.R.E.), as circumstances permit, the substance of their testimony will show

that the Objectors knew as early as March 30, 1988 and as late as October 9, 1991 that Applicant did not have any water contracts and elected to deter the use of this fact until trial on the Applicant's tributary claim in an effort to finally dispose of it rather than seek its pretrial dismissal on a motion for summary judgment or otherwise.

7. The foregoing evidence is material and competent and clearly relevant in that it relates to Objectors' knowledge regarding the existence of Applicant's water contract status and Objectors' failure to mitigate because of their election to pursue resolution of Applicant's tributary claim through litigation and not through summary judgment or other pretrial motion or proceeding.

8. This Offer of Proof is being made in writing via this attachment to Applicant's Reply Brief to show that an evidentiary hearing is necessary and that the offered evidence supports the Applicant's argument that the Objectors failed to mitigate their damages and developed their evidence regarding the tributary claim according to a plan of action to pursue resolution of the tributary claim through litigation and not through a motion for summary judgment or other pretrial motion or proceeding.

C. In general this Offer of Proof is sufficiently specific and made in good faith such that producing the proposed witnesses is not necessary until this Court has ruled on Applicant's motion requesting due process and an evidentiary hearing on the matter of attorneys fees and costs.

Respectfully submitted this 22nd day of November, 1991.

DISTRICT COURT, WATER DIVISION 3, COLORADO

Case No. 86-CW-46

TRANSCRIPT OF PROCEEDINGS VOLUME XXIX

November 22, 1991

CONCERNING THE APPLICATION FOR WATER RIGHTS OF:

AMERICAN WATER DEVELOPMENT, INC., THE BACA RANCH COMPANY AND THE BACA CORPORATION, IN SAGUACHE COUNTY.

BE IT REMEMBERED that the above-entitled matter came on for trial on the 22nd day of November, 1991, before the HONORABLE ROBERT W. OGBURN, sitting in Water Division Three, Alamosa County, Colorado.

APPEARANCES:

For Applicants American Water Development, Inc., The Baca Ranch Company, and The Baca Corporation:

JACK F. ROSS, ESQ.
DAVID C. HALLFORD, ESQ.
THOMAS S. CRABB, ESQ.

* * *

THE COURT: Are we ready to proceed with the motion concerning costs and fees?

MR. ROSS: The Applicant is, your Honor.

THE COURT: Mr. Ross.

MR. ROSS: May it please the Court. The [p. 6475] Applicant's reason for filing the motion first simply is that after the Court entered the order dismissing the tributary claim, it became apparent that the Court had also, in the process of making that ruling, made some findings and determinations with respect to the entitlements of the Objectors to receive fees and costs.

The arguments on the motion which were held and disposed of on October 10 dealt with the issue of whether the claim could be dismissed on the motion of the Applicant and whether doing so under the law would cause any legal prejudice or injury to the Objectors.

In granting the motion and dismissing the claim without prejudice, the Court necessarily had to find that there was no legal injury or prejudice to the Objectors by the grant of that motion.

That's all that was before the Court at that time, but we've understood from comments by the Court since then, and certainly from the comments from the bench when the matter was ruled on, that the apparent conclusion the Court had reached, without benefit of any evidentiary hearing, without benefit of the opportunity for the Applicants to present evidence to support their position, or for that matter, the Objectors to support their position, if they had one, was that they indeed were entitled to receive fees and costs; but there's no [p. 6476] factual record demonstrating that; and that as far as the Court was concerned, the only question appeared to be how much those fees and costs should be; that the amount should be determined by some sort of summary preemptive process similar to what is followed in other

matters such as domestic relations and other matters where attorneys' fees are provided for by specific statute.

And our concern was very simply that our client was thereby exposed to a substantial monetary claim without having had an opportunity for a fair trial on the merits of the entitlement of the Objectors, nor a fair trial with respect to the evidence required to see whether any of the defenses that might be available to the Applicant could be pleaded and proven. All of that was shortcut.

In fact, what appeared to be the case was that the railroad was under full head of steam and about to leave the station. We filed a motion largely for the purpose of making it possible for the engineer and for the other passengers on the train to take a second hard look at the rules of the road, not to suggest that the Court had no discretion, but rather that to avoid its abuse, the Court needed to follow certain procedures to assure to the Applicant its due process in the matter of establishing whether an entitlement existed, and if so, [p. 6477] how much it might be.

We then proceeded to point out to the Court, as we reiterate today, that under the rule under which the motion was filed and the dismissal was granted, there was not a substantive authority for the Court to impose rules, impose fees and costs against the Applicant; that the American rule with respect to fees is still alive and well in the state of Colorado, and that unless Objectors can bring themselves within an exception to the American rule or a specific statute can be identified under which those fees might be claimed, the Rule 40 itself does

not – Rule 41 itself does not provide an independent substantive basis for the award of fees and costs.

* * *

[p. 6481] . . . An out-of-hand determination that the fees and costs should be paid without any evidentiary record before it, is simply an indication that the Court has not fully considered the application of the rule or given the Applicant a fair opportunity to present the evidence which would enable it to demonstrate that the Objectors are not entitled to any such award.

And that's why, your Honor, among other reasons, we made an offer of proof today as part of our reply brief because we wanted the Court to know what [p. 6482] would happen if – at least as far as we're able to tell, if the Court were to permit a due process procedure, allow us to have a hearing, first of all, to determine the substantive right of the Objectors to receive the kind of award that they claim, that substantive hearing would require the evidence to determine whether under the statutory standard the Applicants filing was timely.

If after hearing that evidence, whatever evidence the Objectors may be able to produce to counter that, the Court should find that the request to dismiss – the motion to dismiss was not timely made under the standards prescribed by the rule and the statute, then there would still be a further evidentiary hearing required to determine whether the Objectors, having a duty to mitigate their damages – their claim of damages, had – in fact, had the information necessary to be put on notice that they might have an opportunity to mitigate their damages,

and whether having been put on notice of that, they failed and neglected to do so.

* * *

[p. 6483] If the Court, after an evidentiary hearing, is persuaded that they did not believe, however, that the validity of such a position warranted their filing motions for summary judgment in order to cut their costs and mitigate their damages, then the Court might successfully award attorneys' fees based upon the fact that they didn't need to mitigate or they couldn't have mitigated.

We believe evidence we can present and we've offered to prove will demonstrate that they, both knew that they had an opportunity, and that they deliberately chose not to cut their costs, not to reduce their exposure, but rather to carry right on up to the brink.

* * *

[p. 6484] Under those circumstances, we believe we can demonstrate with a factual record that even if the Court were to find that the Applicant's motion to withdraw was untimely, though we don't believe the Court can really find that on the real evidentiary record, but even if it did, that these Objectors cannot bring themselves within the ambit of that requirement of the law and show that they mitigated when they had an opportunity to.

All we're saying in our motion at this stage of the game is these are issues that require a due [p. 6485] process analysis. These are matters that the Court should provide for a fair hearing, an opportunity for people to develop their evidence. Obviously it will become very

important in determining these matters for the Applicants to have access to discovery, not that we choose to protract it.

Our proposal suggested that the matter be completed in 60 days; that we believe we can find out what needs to be known in order to present a proper and full record to the Court for it to make whatever determination it needs to make with respect to these claims.

* * *

[p. 6486] Our position is the Court should exercise its discretion by allowing an appropriate due process procedure so that it has a full and fair hearing before it makes any determination, and we can see this happening, your Honor, in a continuum.

There isn't any reason why if the Court follows the procedure that we think is appropriate, it can't hold a hearing on the substantive right to receive an award; and if it makes a determination on both elements that we've described here, it can then proceed to a determination of the appropriateness and to a determination of the reasonableness of any of the fees [p. 6487] that have been claimed.

But, once again, that kind of a determination, where, as the court has announced in its ruling yet today, there is difficulty in determining what evidence is appropriate for a tributary proof and what evidence is appropriate for a nontributary case proof. Surely there is going to be overlap in preparation and surely there needs to be a very careful scrutiny made of claims made for fees encountered in preparation for a tributary claim.

We believe that due process requires our ability to examine through discovery and with all the powers necessary under the Court to determine, if it gets to that point, the appropriateness of it – of any claim – reasonableness of any claim, and to permit us to be prepared for a fine, solid, evidentiary hearing to be able to provide for the Court all of the facts it needs to make a proper judgment in that matter.

If after all that is heard, the judge is persuaded that the Objectors have met the requirements of the law and awards the fees, the Court will not have abused the due process rights of the Applicant in the process of making its determination. . . .

[p. 6488] MR. ROSS: That's the reason why we filed our motion, your Honor. That's the reason we believe it's appropriate for the Court to follow these procedures. We don't see that it's going to create any special burden for these other people to come forward.

After all, it's only fair for them to say we believe you on this and here is what we've done and here is why, and we expect that to be done in a reasonable fashion and not a preemptory resort of quick access to the Court saying we got to get this, you can inquire a little bit. That isn't due process, your Honor. That's what we're after here.

* * *

[p. 6498] THE COURT: Mr. Ross.

MR. ROSS: Let there be no mistake, your Honor, the course of action chosen by the Applicants since October 10, 1991 should not be construed or misconstrued by anyone, whether it be the Court or counsel

or anyone else, as an acceptance willy-nilly of the Court's determination on that day that these Objectors were entitled – had an entitlement to receive fees and costs.

THE COURT: October 10?

MR. ROSS: October 10, I believe, was the date upon which the Court finally ruled in the second pretrial conference, and I believe that's the date on which the Court indicated it would assess fees and costs.

THE COURT: Thank you.

* * *

DISTRICT COURT, WATER DIVISION 3, COLORADO

Case No. 86CW46

APPLICANT'S REQUEST FOR PREHEARING CONFERENCE AND ORAL ARGUMENT ON ISSUE OF ENTITLEMENT

CONCERNING THE APPLICATION FOR WATER RIGHTS OF AMERICAN WATER DEVELOPMENT, INC.

IN ALAMOSA, CONEJOS, COSTILLA, HINSDALE, MINERAL RIO GRANDE AND SAGUACHE COUNTIES.

COMES NOW the Applicant, American Water Development, Inc. ("Applicant"), by and through its counsel, and requests that the Water Court schedule and hold a prehearing conference prior to the evidentiary hearing on the award of attorney fees and costs and that the Water Court hear oral argument on the issue of entitlement.

As grounds for its request, Applicant states as follows:

1. The Court, without the benefit of full briefs and argument on the issue and in reliance on federal case law, held that Rule 41(a)(2) C.R.C.P. allowed the Court to award attorney fees and costs to the Objectors as a term and condition of its dismissal of Applicant's tributary claim. Subsequently, Applicant has submitted briefs evidencing the Colorado General Assembly's adoption of an attorney fee statute which supersedes and establishes the

exclusive circumstances under which attorney fees may be awarded. Applicant has not previously had the opportunity to argue the effect of the statute and corresponding new provision in the Colorado Rules of Civil Procedure and hereby requests an opportunity to do so. The issue is a legal issue for determination by the Court, and its early determination may avoid the necessity for an evidentiary hearing, or at least the need for inclusion of the issue in the hearing. Therefore, it would be appropriate to hear the arguments of counsel at the prehearing conference.

2. The Objectors have filed claims for attorney fees and costs which collectively total approximately $2.7 million. The court has ruled that an evidentiary hearing will be necessary to determine the reasonableness of the amounts claimed by the Objectors, and that Applicant may present evidence on the associated issues which include failure to mitigate fees and costs, inclusion of nontributary fees and costs in said claims, the appropriate allocation of fees and costs to each claim, the adequacy of the description of work claimed and other issues related to the reasonableness of the claims.

3. To facilitate the hearing process, to avoid unnecessary time, expense and surprise and to narrow the issues, Applicant requests that the Court hold a formal prehearing conference. Ten days prior to the conference, each party would exchange a list of exhibits and witnesses, with a summary of testimony and lists of undisputed and disputed issues. At the prehearing conference, the Court would resolve evidentiary disputes, define the disputed legal and factual issues and order preparation of a prehearing statement to govern the conduct of the hearing. The holding of a prehearing conference will

serve the interests of judicial economy by resolving preliminary matters, resolving evidentiary disputes and providing for an exchange of exhibits and summaries of testimony. This will substantially reduce the amount of required time for the hearing. It will also facilitate making an estimate of the hearing time required, so that the hearing can be set for an appropriate length of time and will not need to be bifurcated.

Applicant requests that each party be required to attend the prehearing conference in Alamosa.

Respectfully submitted this 18th day of February, 1992.

SAUNDERS, SNYDER, ROSS
& DICKSON, P.C.

By: /s/ William J. Kirven III
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Wayne J. Fowler, #183
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ATTORNEYS FOR APPLICANT

DISTRICT COURT, WATER DIVISION 3, COLORADO

Case No. 86CW46

APPLICANT'S MOTION TO DISMISS CLAIM SET FORTH IN PART IV OF THE AMENDED APPLICATION

CONCERNING THE APPLICATION FOR WATER RIGHTS OF AMERICAN WATER DEVELOPMENT, INC.

IN ALAMOSA, CONEJOS, COSTILLA, HINSDALE, MINERAL, RIO GRANDE AND SAGUACHE COUNTIES.

COMES NOW the Applicant, by its attorneys and pursuant to C.R.C.P. 41(a)(2) moves the Court to dismiss the claim for relief set forth in Part IV (pp. 9-12) of the Amended Application. As grounds for its motion Applicant states the following:

1. Applicant, as a result of prior rulings in this action, and other circumstances, has now concluded that Applicant has no reasonable likelihood of prevailing on the claim set forth in Part IV of the Amended Application.

2. Judicial economy requires that Applicant withdraw its claim in Part IV of the Amended Application and that such claim be dismissed at this time.

3. Dismissal of the claim in Part IV of the Amended Application will prevent the unnecessary time and expense involved in trying the claim.

WHEREFORE, the Applicant respectfully requests that the claim set forth in Part IV of the Amended Application be dismissed at this time.

Respectfully submitted this 26th day of September, 1991.

SAUNDERS, SNYDER, ROSS
& DICKSON, P.C.

By /s/ Jack F. Ross
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ATTORNEYS FOR APPLICANT
AMERICAN WATER
DEVELOPMENT, INC.

DISTRICT COURT, WATER DIVISION 3, COLORADO

Case No. 86 CW 46

REPORTER'S TRANSCRIPT

CONCERNING THE APPLICATION FOR WATER RIGHTS OF:

AMERICAN WATER DEVELOPMENT, INC., THE BACA RANCH COMPANY, AND THE BACA CORPORATION, IN SAGUACHE COUNTY.

The pretrial hearing in this matter commenced on Thursday, September 26, 1991, before the HONORABLE ROBERT W. OGBURN, District Judge within and for the 12th Judicial District, State of Colorado.

* * *

MR. ROSS: Your Honor, I believe we may be able to assist the Court in shortening up some of these matters. We're filing as of this point in time a motion to dismiss the claims set forth in Part 4 of the Amended Application, as we state in the written motion.

As a result of prior rulings in this action and pursuant to Colorado Rules of Civil Procedure 41(a)(2), we move the Court to dismiss the claim for relief for the reason that we have now had to conclude yet this morning. The applicant has no reasonable likelihood on prevailing on the claims set forth on that part of the Amended Application, that is, the tributary claim, Your Honor.

And, as I point out, because of the adverse rulings that have occurred – have occurred so far, our case has essentially been so emasculated that we cannot put on a case that will have a reasonable likelihood of prevailing; and for that reason, we move the Court to dismiss that claim under the rule. And as we understand the position of the Colorado Supreme Court with respect to such motions, they are appropriate to be granted.

* * *

[p. 71] I refer the Court to *Tillery v. District Court*, a 1984 Colorado Supreme Court case which holds that it is appropriate for the Court to enter such an order. It may, on an appropriate hearing, determine terms and conditions that are just for the entry of such an order; but at this stage of the game, I believe it does indeed shorten up what the Court has to do for further pretrial activities today and can eliminate the necessity for having to put on a case for an attempt to prove up a case which can no longer be done because of the Court's prior rulings.

* * *

DISTRICT COURT, WATER DIVISION 3, COLORADO

Case No. 86 CW 46

REPORTER'S TRANSCRIPT

CONCERNING THE APPLICATION FOR WATER RIGHTS OF:

AMERICAN WATER DEVELOPMENT, INC., THE BACA RANCH COMPANY, AND THE BACA CORPORATION, IN SAGUACHE COUNTY.

The pretrial hearing in this matter commenced on Thursday, October 10, 1991, before the HONORABLE ROBERT W. OGBURN, District Judge within and for the 12th Judicial District, State of Colorado.

APPEARANCES:

FOR THE APPLICANT:

JACK F. ROSS
DAVID C. HALLFORD
THOMAS S. CRABB

FOR THE OBJECTORS:

JOHN HILL, et al.

* * *

[p. 54] MR. HILL: The point is that we did want a decision on the merits of the impact of their proposal on the federal interests in the Valley just as the other water users in this valley wanted a decision on the merits. So we didn't file a dispositive motion because a dismissal with prejudice, as has been discussed already, may not preclude them from coming back.

So it's perfectly legitimate to destroy the enemy on the battlefield while you have them decisively engaged rather than let them get away to fight another day.

* * *

DISTRICT COURT, WATER DIVISION 3, COLORADO

CASE NO. 86-CW-46

OBJECTORS' OPPOSITION TO APPLICANT'S MOTION TO DISMISS CLAIM SET FORTH IN PART IV OF THE AMENDED APPLICATION

CONCERNING THE APPLICATION FOR WATER RIGHTS OF:

AMERICAN WATER DEVELOPMENT, INC.,

IN ALAMOSA, CONEJOS, COSTILLA, HINSDALE, MINERAL, RIO GRANDE AND SAGUACHE COUNTIES.

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* * *

A. THE COURT COULD DENY APPLICANT'S MOTION IN LIGHT OF THE INVESTMENT OF THE OBJECTORS IN DEFENDING AGAINST IT

As noted above, because of the magnitude and potential impact of the Application and Amended Application, the Objectors were forced to dedicate all available resources to this case for nearly five years. The District, for example, which was created by state statute, C.R.S. §§37-48-101, *et seq.*, has committed substantial resources to this case, both in terms of monetary resources and time and effort, since 1987. When the District's existing budget proved inadequate, the District sought and obtained the approval of the Division of Local Government of the Department of Local Affairs to increase its mill levy by

one mill in order to pay the costs of this litigation. *See* Curtis Affidavit (Exhibit A).

When even those monies proved inadequate, the District sought the approval of the taxpayers to borrow monies to pay for the cost of this litigation. *Id.* An election was held on December 11, 1990, and the electorate voted in favor of authorizing the District to borrow $472,000, the maximum permitted under state law, by a vote of 8,700 in favor and only 136 opposed. *Id.* Those funds have been borrowed and have made it possible for the District to continue funding this litigation. Even with all of that, the District has been able to effectively defend this litigation to date only because of the willingness of counsel and others to work at reduced rates and write down bills. *Id.*

Likewise the Water Users have stretched their financial resources to their very limit in an effort to defend against the claims of the Applicant. The voluntary assessments of the Water Users are at an all time high and cannot be sustained at that level. Affidavit of Bill V. Kopfman (Exhibit B). When combined with the tax levy of the District, the individual water right owners of the Water Users' members are paying two and three assessments to defray the costs of this litigation. Even these high assessments would not permit the Water Users full participation if it were not for the willingness of counsel and consultants to work at reduced rates and write-down their bills.

Thus, the prospect of a dismissal of the Applicant's Tributary Claim on the eve of trial with the potential for a new application and entirely new proceedings at some

date in the future poses a risk of dramatic prejudice to the District and other Objectors. The District has taxed and borrowed to the limit of its legal capacity to defend against the threats posed by the Amended Application. Likewise, the Water Users are at the very limit of their financial resources and their capacity to defend against the claims of the Applicant or others has been dramatically impaired.

* * *

DISTRICT COURT, WATER DIVISION 3, COLORADO

Case No. 86 CW 46

REPORTER'S TRANSCRIPT

CONCERNING THE APPLICATION FOR WATER RIGHTS OF:

AMERICAN WATER DEVELOPMENT, INC., THE BACA RANCH COMPANY, AND THE BACA CORPORATION, IN SAGUACHE COUNTY.

The fees and costs trial in this matter commenced on Tuesday, April 21, 1992, before the HONORABLE ROBERT W. OGBURN, Water Judge within and for Water Division 3, State of Colorado.

APPEARANCES:

FOR THE APPLICANT:

JOSEPH M. MONTANO
DIANE B. DAVIES
FRED CHEEVER

* * *

[p. 640] THE COURT: Well, this is a trial to the Court, and since Mr. Martz, like Mr. Moses, comes under the rubric of expert emeritus, we want to hear what he has to say. It's fun, I'd even be willing to listen to Mr. Martz talk about repairing water rights east of the Mississippi, but that probably would be going too far afield.

* * *

[p. 642] Q. (By Mr. Montano) In other words, as I understand what you were doing is you were trying to see what type of costs were essential to be incurred by the objectors?

A (By. Mr. Martz) Right.

Q In order for the proceedings to be conducted under the legislative mandate?

A Right.

Q And did you also look at summaries of witnesses?

A Yes, and summaries of exhibits, again, to address the question of what had been done especially for the tributary water issue, what was done in a area-wide political context of fighting an appropriation, but not in the adjudication proceeding process, that is, looking at what can be done to block the development of a project, which is perfectly appropriate but not in the context of assessing costs under 42(a)(2) (sic).

* * *

AFFIDAVIT OF ALISON MAYNARD

(Filed Dec. 9, 1991)

Alison Maynard, of age and duly sworn, states under oath as follows:

1. From April 1989 until May 1990, as an Assistant Attorney General for the State of Colorado, I was counsel for the state agencies which are objectors in the AWDI case in Water Division 3.

2. In the summer of 1989, I met with David Robbins, who represented the Rio Grande Water Conservation District, another objector. I asked him why he had not moved for summary judgment on the basis of speculation, or whether he had considered doing so. I drew to his attention the fact that at the end of 1988, in Water Division 4, the application of NECO, a private water development company, had been dismissed with prejudice on motion, on the basis of speculation. NECO was found to have no contracts in effect for the sale of water; in addition, Judge Brown had indicated in his opinion, as I recall, that it would be reasonable to require such contracts to be in place as of the date of application in order to overcome the charge of speculation. AWDI's situation I saw as very similar to NECO's, and I was aware that AWDI had admitted in sworn discovery responses by that time that it had no contracts in effect.

3. David Robbins became excited and exclaimed, "We have a right to litigate our own issues in this case!" He proceeded to rail against Jeris Danielson, the state engineer and one of my clients, apparently believing that

it was Jeri who was behind an attempt to file such a motion for summary judgment.

4. Not long afterwards, David Robbins met with Duane Woodard, Colorado Attorney General, without notifying me. I happened to learn that this meeting would take place from accidentally seeing written notes of a telephone conversation, indicating that the subject of the meeting was AWDI, which Lois Witte, the deputy of the natural resources section, had taken. I thus arranged to be present at this meeting, with Wendy Weiss, and David was surprised to see us. He denied that he had come to discuss AWDI, and instead related anecdotes to Duane having to do with the allegedly erratic behavior of Jeri Danielson in the Kansas v. Colorado litigation.

5. On or about September 27, 1989, Duane Woodard summoned me into his office, along with Lois Witte. He told me that John Carlson, who represented another objector, the Rio Grande Water Users Association, had informed him a bill was being sponsored in the state legislature to subordinate the state engineer to a newly created water authority, thus effectively stripping him of his powers. Duane indicated that John Carlson and David Robbins supported this bill, as they were furious with Jeri. Duane further stated that Jeri had "burned his bridges with Chips Barry, and he has burned his bridges with me." As examples of Jeri's allegedly irresponsible behavior, Duane indicated John had mentioned the state's prior response on the federal preemption motion (which in fact all the state agencies joined), and the possibility now of a motion for summary judgment in AWDI. Without soliciting my advice on the merits of filing such a motion, Duane ordered me not to file any motions in the

case henceforth. Although he permitted me to respond to discovery, Duane instructed me to "let the sleeping giant lie." I understood him to mean that the state was not to take an independent or active role in the litigation, but was to follow the initiatives made by John Carlson and David Robbins at most. Thus, no motion for summary judgment on the tributary claim was filed.

6. I am aware that, approximately 10 days before the trial began in this matter, in October 1991, AWDI moved to dismiss its tributary claim. I believe it did so because it still did not have contracts in effect, and knew itself it could not overcome the speculation charge. AWDI's motion was granted, and it was ordered to pay attorney fees to the objectors for the needless expenses they incurred in defending against that claim.

7. Although of course there would have been no guarantee that a motion for partial summary judgment on the tributary claim would have been successful, it is my opinion that the active efforts of David Robbins and John Carlson to prevent the filing of such a motion, which if successful would have shortened and possibly even ended this litigation over two years ago, should be weighed by the court in determining the award of attorney's fees which equitably should be awarded to objectors for their exertions *vis a vis* the tributary claim during that period.

/s/ Alison Maynard
Alison Maynard

Subscribed and sworn to before me this 5th day of December, 1991, in the City and County of Denver, Colorado.

My commission expires: July 2, 1993.

/s/ Genevieve A. Ratcliff
Notary Public
7039 E. 18th Ave
Address
Denver, CO 80220

SUPREME COURT, STATE OF COLORADO

Cases No. 92SA141 and 92SA 263

Appeal from District Court, Water Division 3, Case No. 86CW46

BRIEF OF APPELLANT-PETITIONER
AMERICAN WATER DEVELOPMENT, INC.

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92 SA 141

AMERICAN WATER DEVELOPMENT, INC.,
a Colorado corporation,

Applicant-Appellant,

vs.

CITY OF ALAMOSA, et al.,

Objectors-Appellees;

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92 SA 263

AMERICAN WATER DEVELOPMENT, INC.,

Applicant-Petitioner,

v.

RIO GRANDE WATER CONSERVATION DISTRICT, et al.,

Objectors-Respondents.

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* * *

2. The Trial Court Erred in Failing to Consider the Unique Nature of a Water Adjudication.

Vast quantities of water underlie land owned by American Water in the San Luis Valley. Colorado statutes required American Water to adjudicate its interests in the

trial court in order to determine its rights to the water under its property and to put the water to beneficial use. It is the policy of this State to maximize the use of its water resources. *People v. Fellhauer,* 167 Colo. 320, 447 P.2d 986 (1968).

American Water claimed rights to nontributary groundwater. American Water also presented alternative theories entitling it to put the water to beneficial use, one of which was that American Water could appropriate the water if it was determined to be tributary in nature. American Water acted properly in presenting alternative nontributary and tributary theories to appropriate the water it sought. *City and County of Denver v. Monaghan Farms,* 807 P.2d 9, 17 (Colo. 1991).

American Water did not specify or seek out Objectors, but following statutory mandates, it gave notice in order that those who wished, could come forward voluntarily and object. § 37-92-302, C.R.S. (Addendum A at 12). The Objectors' actions in this case demonstrate the unusual freedom that an objector has in electing how it wants to pursue its objection to an application. While the law allows an objector freedom, it does not provide him with the luxury of pursuing an independent strategy at the expense of the applicant. The record demonstrates that Objectors pursued their own agenda, which went beyond addressing the effect of American Water's Tributary Claim on vested rights. As attorney for the U.S. commented, in explaining why he had not filed a dispositive motion on the Tributary Claim:

> The point is that we did want a decision on the merits of the impact of [American Water's application] on the federal interests in the Valley

> just as the other water users in this valley wanted a decision on the merits. So we didn't file a dispositive motion because a dismissal with prejudice, as has been discussed already, may not preclude them from coming back.
>
> So its perfectly legitimate to destroy the enemy on the battlefield while you have him decisively engaged rather than let them get away to fight another day.

V. 40, p. 54, l. 1-9.

An affirmance of the trial court's decision will have a chilling effect upon future applicants who wish to exercise their constitutional right to appropriate water. Once an application is filed, "any person who wishes" may file a statement of opposition, without complying with traditional standing requirements. *See Bunger v. Uncompahgre Valley Ass'n*, 557 P.2d 389 (Colo. 1976); § 37-92-302(1)(b), C.R.S. An applicant has no control over the number of objectors who participate in an action, or the fees and costs they may generate in pursuing their own ends. Thus every potential applicant, regardless of its size or financial resources and its potential for successful completion of its appropriation, would have to consider whether to file its application in view of the possibility that unforeseen circumstances, raised by unforeseen objectors, or adverse pretrial rulings, might require voluntary dismissal of the application. If the trial court's application of 41(a)(2) is upheld, such dismissal could routinely be accompanied by the imposition of attorney fees and costs, wholly outside the applicant's control, without regard to whether the application was frivolous, or whether it was pursued in good faith.

Colorado Uniform Water Court Rule 5(b) reflects the distinction between water court proceedings and other civil actions. Paralleling Rule 41(a)(2), Water Court Rule 5(b) requires court approval for withdrawal of an application for water rights if a statement of opposition has been filed. Rule 5(b), however, makes no provision for "terms and conditions."

* * *

SUPREME COURT, STATE OF COLORADO
Cases No. 92SA141 and 92SA263
Appeal from District Court, Water Division 3,
Case No. 86CW46

REPLY BRIEF OF APPELLANT-PETITIONER AMERICAN WATER DEVELOPMENT, INC.

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92 SA 141

AMERICAN WATER DEVELOPMENT, INC.,
a Colorado corporation,

Applicant-Appellant,

v.

CITY OF ALAMOSA, et al.,

Objectors-Appellees;

---

92 SA 263

AMERICAN WATER DEVELOPMENT, INC.,

Applicant-Petitioner,

v.

RIO GRANDE WATER CONSERVATION DISTRICT, et al.,

Objectors-Respondents.

FAEGRE & BENSON
Joseph M. Montano, No. 3695
Diane B. Davies, No. 11182
370 – 17th Street, Suite 2500
Denver, Colorado 80202-4004
(303) 592-5900

ATTORNEYS FOR APPLICANT-APPELLANT AMERICAN WATER DEVELOPMENT, INC.

* * *

IV. THE TRIAL COURT'S ORDERS ALLOWING FEES AND COSTS SHOULD BE REVERSED.

In order to determine its rights to the water under its property, AWD was required to adjudicate its interests in the water court. AWD did not seek out Objectors but, following statutory mandates, gave notice so that those who wished to could object. C.R.S. 37-92-302. Objectors are not defendants in this lawsuit. AWD did not sue them. Objectors have not disputed that they voluntarily entered this litigation.

* * *

The trial court erroneously imposed terms and conditions under Rule 41 on the withdrawal of the Tributary Claim without prejudice, ignoring Rule 11 and C.R.S. § 13-17-102(5). The trial court compounded the error by applying an incorrect standard in the amount of fees and costs allowed under Rule 41, as well as under Rule 54(d). AWD never accepted these "terms and conditions", and seeks relief from the trial court's orders in this Court.

* * *

Objectors never address the distinctions drawn in AWD's Opening Brief regarding the unique nature of water adjudication or the bona fide reasons for AWD's dismissal of its Tributary Claim. When these factors are considered, it is the punitive condition of fees and costs which is unwarranted and unfair, and the trial court's ruling must be reversed.

* * *

SUPREME COURT, STATE OF COLORADO
Cases No. 92SA141 and 92SA263

PETITION FOR REHEARING

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92 SA 141

AMERICAN WATER DEVELOPMENT, INC., a Colorado corporation,

Applicant-Appellant,

v.

CITY OF ALAMOSA, et al.,

Objectors-Appellees;

---

92 SA 263

AMERICAN WATER DEVELOPMENT, INC.,

Applicant-Petitioner,

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RIO GRANDE WATER CONSERVATION DISTRICT, et al.,

Objectors-Respondents.

Appeal from District Court, Water Division 3, Case No. 86CW46
The Honorable Robert W. Ogburn, Judge

En Banc Opinion by Justice Lohr (Justice Scott did not participate)
Judgement Entered May 9, 1994

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* * *

AWARDING $2.7 MILLION TO VOLUNTARY LITIGANTS WHO WERE NOT REQUIRED TO SATISFY STANDING REQUIREMENTS IS UNCONSTITUTIONAL.

In *Lujan v. Defenders of Wildlife,* 112 S. Ct. 2130 (1992), the United States Supreme Court held Congress cannot constitutionally relieve voluntary litigants from having to comply with traditional standing requirements. Just as Colorado's legislature has done in water cases, *see* C.R.S. § 37-92-302(1)(b). Congress had attempted to allow "any person" to litigate certain environmental claims without showing "injury in fact." The Supreme Court declared that "ignoring the concrete injury requirement . . . would be discarding a principle fundamental to the separate and distinct constitutional role" of courts. 112 S. Ct. at 2144-45 (emphasis added).

The public's interest in water and environmental matters simply cannot, according to the Supreme Court, "be converted into an individual right by a statute . . . that permits all citizens (or . . . a subclass of citizens who suffer no distinctive concrete harm)" to present their claims in litigation. *Id.* at 2145. The issue is *not* merely quantitative, contrary to this Court's reasoning in rejecting AWD's standing argument. *Compare* Opinion at 72-74 (focusing on "the number of objectors who participate in an action") *with* Opening Brief at pp. 20-22. Rather, the issue is *qualitative:* whether the person who voluntarily comes before the judiciary suffers some direct, discrete injury or is merely asserting he suffers in some indefinite way in common with people generally. 112 S. Ct. 2142-2146.

Judge Ogburn's award of $2.7 million to the Objectors strays even further from these fundamental principles. Not only were the Objectors allowed to enter court voluntarily under a statute that opens the door to "any person" without regard for the dictates of standing, but they were also rewarded for their political efforts with a massive monetary award. This Court's validation of that award is inconsistent with its announced reliance upon United States Supreme Court precedent in implementing Colorado's own standing mandates. *See, e.g., Wimberly v. Ettenberg*, 570 P.2d 535 (Colo. 1977). Indeed, in *Colorado General Assembly v. Lamm*, 700 P.2d 508, 516 (Colo. 1985) (emphasis added), this Court, citing *Wimberly*, emphasized that "[t]he requirement of an injury in fact is of *constitutional dimension.*"

It is the constitutional dimension of standing that has been ignored in this case. The very essence of due process, which binds both State and Federal governments, is "fundamental fairness." *See, e.g., Watso v. Department of Social Services*, 841 P.2d 299, 307 (Colo. 1992); *Board of Nursing v. Lang*, 842 P.2d 1383, 1386 (Colo. App. 1992). It is fundamentally unfair to uphold an award for attorney fees and costs in favor of voluntary litigants who are not required to satisfy the fundamental constitutional requirements of standing. Legislative efforts to allow "any person" to avoid those requirements cannot withstand constitutional scrutiny.

Judge Ogburn's award of $2.7 million to the Objectors, who never were required to satisfy the tests of constitutional standing, accordingly violates due process. In light of the Supreme Court's decision in *Lugan* and this

Court's repeated reliance upon the constitutional principles enforced in that case, the monetary award to the Objectors must be reversed and their claims for fees and costs dismissed for lack of constitutional standing.

* * *